TAGORE LAW LECTURES—1884.

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THE LAW

RELATING TO

GIFTS, TRUSTS, AND TESTAMENTARY DISPOSITIONS

AMONG THE

MAHOMMEDANS.

(ACCORDING TO THE HANAFI, MALIKI, SHÂFEÏ, AND SHIAH SCHOOLS.

COMPILED FROM AUTHORITIES IN THE ORIGINAL ARABIC

WITH

EXPLANATORY NOTES AND REFERENCES

TO

DECIDED CASES,

AND

AN INTRODUCTION ON THE GROWTH AND DEVELOPMENT OF

MAHOMMEDAN JURISPRUDENCE.

BY

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PREFACE.

The following pages comprise the Tagore Law Lectures delivered in the year 1884, at the Calcutta University. The subjects which they embrace are among the most important in Mahommedan Law, *viz.*, Gifts, Trusts and Testamentary Dispositions; subjects frequently occupying the attention of Courts of Justice in British India, and so interwoven with the domestic economy of the Mussulmans all over the world, as to necessitate a fuller consideration than has hitherto been bestowed in any treatise in the English language. I have endeavoured to make my chapters on these several subjects as comprehensive as the exigencies of the lecture-room enabled me to do. The limited space at my command has prevented my dealing with other branches of dispositions, but I hope shortly to supplement this volume by a treatise on the law relating to Sale, Mortgage, Bailment, etc.

The favour with which my Treatise on the Personal Law of the Mahommedans has been received, even in countries outside of British India, leads me to hope that the work which I now place before the public, will supply a much-felt demand. In the preface to the Personal Law, I have pointed out the value of the several works existing in the English language on Mahommedan Law, I will therefore not make any observations on the subject here. In dealing with the Hanafi Law in this volume, I have chiefly depended on the Radd-ul-Muhtàr, the Fatàwa-i-

Kazi Khan, the Fatâwa-i-Alamgiri, and the Majma-ul-Anhar, besides other authorities noted in the work. As regards the Shiah Law, I have principally drawn my information from the Jawâhir-ul-Kalâm, the Jâma-ush-Shattât, the Sharâya and the Mafâtîh. In some cases, where I have quoted from the Sharâya and the Alamgiri, I have adopted, with slight variations, the phraseology of Mr. Neil Baillie. My chapters dealing with the Shâfeï Law are taken from the Minhâj-ut-Tâlibin, for a copy of which I am indebted to the courtesy of H. E. the Governor-General of Netherlands-India. In preparing my lectures I have had to choose from a mass of intricate principles with due regard to the requirements of the student as well as the practical lawyer. This fact and the circumstance that the work has been carried through the press in the midst of professional engagements, lead me to hope that its shortcomings will be viewed with indulgence.

I desire in conclusion to express my acknowledgments to the kind friends, who have assisted me by suggestions, and the loan of valuable works, in the compilation of this volume. I am also indebted to Mr. C. D. Panioty, Barrister-at-Law, for the Index and the list of cases cited.

N. B.—Attention is invited to the Errata, in which some of the important mistakes in printing have been put together. The few cases, reference to which was omitted in the course of the lectures, are given in the Supplement.

Bar Library,
High Court of Calcutta.
September, 1885.

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TECHNICAL AND OTHER WORDS EXPLAINED IN THE TEXT.

ERRATA.

P. 9, last line, for "Kiyâs" read "Kyâs."
P. 10, line 15, for "*Mushoora*" read "*mash-hoora.*"
Ibid., line 5 (from bottom) for "*Kiyâs*" read "*Kyâs.*"
P. 18, line 4 (from bottom) for "futwas" read "fatwas."
P. 19, line 2, for "Ziffer" read "Zuffer."
Ibid, line 9, for "*Kunya*" read "Kinia."
P. 20, line 13, for "Ziffer" read "Zuffer."
P. 23, line 12, for "Multaka-ul-abhar" read "Multeka-ul-abhar."
P. 29, line 8, for "Sunnah" read "Sunnat."
P. 29, line 4, (from bottom) for "the general adoption of *Usûli*, in preference to, or supersession of, the *Akhbâri* doctrines," read "the general adoption of *Akhbâri*, in preference to, or in supersession of, the *Usûli* doctrines."
P. 30, line 1, for "*Usûli*" read "*Akhbâri.*"
P. 33, lines 2 and 3, (from bottom) for "*Talkhis-ul-maram*, the *Ghayat-ul-ahkam* and the *Tahrir-ul-ahkam*" read "*Talkhîs-ul-marâm*, the *Ghâyat-ul-ahkâm* and the *Tahrîr-ul-ahkâm.*"
P. 38, line 14, for "*Marz-ul-mout*," read "*marz-ul-maut.*"
P. 39, note for "I. L. 3 All" read "I. L. R. 3 Allah."
P. 47, line 9, for "*Mouhoob-alaih*" read "*Mouhoob-lahu.*"
P. 105, line 5, for "Abul Kasim" read "Abul Kâsem."
P. 113, note 2, for "*Ameer-unnissa Khatoon* v. *Abedoonnissa*" read "*Abedoonnissa Khatoon* v. *Ameerunnissa Khatoon.*"
P. 136, line 16 for "benet" read "benefit."
P. 167, line 20, for "*aulâd*" read "*awlâd.*"
P. 173, line 3 (from bottom) for "oondition" read "condition."
P. 183, line 1 for "upen" read "upon."
P. 183, line 18, for "the constitution of *wakf*" read "how a *wakf* may be constituted."
P. 185, line 8, for "wak" read "*wakf.*"
P. 204, line 2, for "the constitution of a *wakf*" read "conditions necessary, to constitute a *wakf.*"
P. 204, line 2 for "the constitution of a *wakf*" read "the conditions necessary to the constitution of a *wakf.*"
P. 209, line 6, for "*sefdi*" read "*sugdi.*"
P. 211, line 9, for "wauld" read "would."
Ibid, line 14 (from bottom) for "hold" read "held."
P. 215, line 3, (from bottom) for "appendix to this chapter" read "appendix I."
P. 219, line 7 (from bottom) for "conditions relating to *wakf*" read "conditions relating to the subject of a *wakf.*"
P. 225, for "Chapter VII," read "Chapter VII (continued.)"
P. 234, line 2, (from bottom) for "the necessary genuflexions" read "the invitation to engage in the *namâz* or to perform the necessary genuflexions."
P. 236, line 2, (from the bottom) for "*Id-ul-uzha*" read "*Id-ul-azha.*"

P. 239, line 28, for "Halwani" read "Halwâï."
P. 240, line 5, for "Imam al-Halwani" read "Imam-ul-Halwâi."
P. 242, line 18, for "Section IV" read "Section III."
P. 263, line 4, (from bottom) for "*Kyum*" read "*Kyyim.*"
P. 293, line 25, for "حبسو" read "احبسو"
P. 307, line 14, for "*akb*" read "*akab.*"
P. 312, line 10, for "Shaik" read "Shaikh."
P. 312, line 2, (from bottom) for "Halwani" read "Halwâï."
P. 367, note 1, for "p. 410" read "p. 420."
P. 376, line 23, for "Jawâhir-ul-kalâon" read "Jawâhir-ul-kalâm."
P. 440, line 5, (from bottom) for "two propositions 'towards' (*ilâ*) &c. &c." read "two prepositions 'to' (*le*) and 'towards' (*ilâ*) *etc.*"
P. 481, line 19, for "Section III" read "Section II" and correct accordingly.
P. 486, line 14, for "indicate" read "indicates."
P. 489, marginal note, for "Hanifa Law" read "Hanafi Law."
P. 493, line 2, (from bottom) for "Appendix VI" read "Appendix VII."
P. 497, line 4, for "the person" read "that person."
Ibid, line 18, for "when legatees" read "when the legatees."
Ibid, line 26, for "are given" read "will be given."
P. 505, line 1, (from bottom) for "Appendix VI" read "Appendix XII."
P. 518, line 20, for "*uzzha*" read "*azzha.*"
P. 528, line 1, (from bottom) omit "Appendix VIII."
P. 564, line 6 et seq., for "The powers of the executors" read "The powers of the executor" throughout.
P. 601, line 24, for "*dain*" read "*dayn.*"

ADDENDA.

P. 181, note 2. After "In" insert figure 1.
P. 220, note, last line, after "appropriator" insert figure 1.
P. 279, note 1. Add *Doe d-Jaun Bibee* v. *Abdoollah Barber*, 1 Fulton's Rep. p. 345.
P. 312, 9 lines from bottom after "see" add "*Musst. Ameeroonnissa Begum* v. *Maharajah Hetnarain Singh.*"
P. 352, note 1, before 5 S. D. A. insert *Mir Nur Ali* v. *Majidah and others.*
P. 433, note 2, before I. L. R. add *Abdur Rahman* v. *Yar Mahomed.*

ADDITIONAL LIST OF CASES.

INTRODUCTION.

THE DEVELOPMENT OF THE MAHOMMEDAN LAW.

LECTURE I.

In spite of many changes that have recently taken place in the ideas of people respecting the importance of the Mahommedan system of jurisprudence, a study of the Mahommedan law still continues to possess great interest for those who are connected either directly or indirectly with the administration of justice among the various communities inhabiting India.[1]

In India, the Legislature has preserved intact the laws of the Mussulmans in all matters relating to inheritance and to dispositions of property. Excepting the special statutes which are of general application and which are

[1] Referring to the popular ignorance on the subject of Mahommedan Law, M. Querry, in the preface to his Droit Musulman, speaks thus:—"A l' exception des personnes quì se livrent à l' étude des langues et de la civilisation Musulmanes, on ignore généralement que les Mussulmans possédent des recueils des lois très-complets et trésétendus, et que les traités de jurisprudence composent une des branches les plus importantes de la littérature. On considère le plus souvent le Koràn comme leur unique livre des droit, et l'on s'étonne, avec quelque raison que des sociétés nombreuses se soient maintenues et se maintiennent encore sans autre code que l'énoncé sommaire, diffus et souvent contradictoire des préscriptions légales que ce livre renferme. Le Korân contient, il est vrai, le germe de droit Musulman, mais le défaut de précision et l'absence de tout dévellopement en rendraient l'application fort difficile, sinon impossible."

LECTURE I. properly speaking municipal laws, there is no *lex loci* in this country. In India, the law is in the main personal. This not only adds to the difficulty of legislation, but considerably enhances the risk of failure in the administration of justice. In the case of the Mahommedan law especially, clothed as it is for the most part in the garb of an unfamiliar language, it is often extremely difficult to ascertain and apply its principles.

It has been occasionally contended at the Bar, and sometimes remarked from the Bench, though, it must be admitted, with some degree of hesitation, that the Hindu and the Mahommedan laws have been preserved to the Hindus and Mahommedans only in questions relating to succession, marriage and other cognate matters. It has been said that the words of 21 Geo. III, Ch. 70 are exhaustive; that, with the exception of the matters mentioned in this Statute, the English law should be regarded as the territorial law of the country. This position seems to me hardly maintainable. One of the objects of the Act, as stated in the preamble, was "that the inhabitants should be maintained and protected in the enjoyment of all their ancient laws, usages, rights and privileges." Had the question been *res integra*, it would have been fairly open to contention, whether it was ever the intention of the Legislature to make any change in the personal laws of the inhabitants of this country, of whatever race or creed. Regard, however, being had to the decision in the case of *Musleah* v. *Musleah*[1] and other cases, it would appear that the tendency of the Courts has been to restrict the operation of the personal laws, in the main, to Hindus and Mahommedans. But the attempt to restrict them still further by confining the operative effect of section 17 to "succession and inheritance," is opposed

[1] Fulton's Rep. p. 420.

as much to the wording of the section itself as to the entire course of decisions and the intention of the Legislature. The word "dealing," in fact, would include dispositions. Besides, the Legislature has declared in express terms, that when there is no special enactment governing the question, the Courts of justice should be guided by the rules of equity and good conscience, and two well-known Judges of the High Court of Calcutta have held that it is in conformity with equity and good conscience, that, as between Mahommedans, all questions relating to dispositions of property should be governed by the Mahommedan Law.[1]

And it has been emphatically recognized by the Bombay High Court that the Mahommedan Law should be applied in the construction of deeds dealing with property executed by Mahommedans, whatever may be the language in

[1] *Zohorooddeen Sirdar* v. *Baharoollah Sircar*, 26th April 1864, Gap. Number of the *Weekly Reporter*, p. 187 per Steer and Levinge, JJ.

"It is contended" said the learned Judges "by the pleaders for the plaintiff, special respondent, that the Mahommedan Law is not applicable to a contract of the nature before the Court; that according to section 15, Regulation IV of 1793 it is only on questions of inheritance, marriage and caste that the Court is called upon to decide in conformity to the Mahommedan Law, and that the present matter before the Court not being of the nature above expressed is to be decided by the ordinary rules of equity and good conscience. In answer to this it may be remarked that the Courts of this country have invariably applied in practice, the Mahommedan Law to a variety of cases other than those coming under the denomination of inheritance, marriage, caste, and even if immemorial and recognized practice did not legalize the action of the Courts, it cannot be said that when this Court administers to Mahommedans their own law, they do otherwise than administer justice according to equity and good conscience." See Note I to this Introduction.

The same contention was raised in the case of *Yusuf Ali* v. *Collector of Tippera*, I. L. R. 9 Cal. Series, p. 141, but the learned Judges (GARTH, C. J. and MACDONELL, J.) decided the question before them on the basis of the Mahommedan Law. The remarks of Mr. Justice Mahmud in the case of *Mazhar Ali* v. *Budh Singh*, I. L. 7 All. 303 will be studied with interest.

 which the disposition is made.[1] As the Contract Act (IX of 1872) regulates all questions relating to sales, bailments &c., I shall, in the following pages, confine myself exclusivly to gifts, wakfs and wasiuts.

I have in another work traced the growth and development of the Islamic jurisprudence, and described in some detail the character of the several schools existing in Islam. A few remarks on this subject, however, will not be out of place here. It may be said that of all systems of law, the Islamic law furnishes, from an historical point of view, the most interesting phenomenon of growth. The small beginnings from which it grew up, and the short space of time within which it attained its wonderful development, mark its position as one of the most important juridical systems in the civilized world.

The grand superstructure of Islamic jurisprudence is founded on the Koranic laws and the traditional sayings of the Prophet, but much of the coping-stone was supplied at Bagdad, in Bokhara, in Syria, in Andalusia and Persia. I have already pointed out that the domestic laws of Islam have a great analogy to the Rabbinnical law. Similarly many of the conceptions of the Saracenic jurists, who flourished in the full tide of Moslem glory and ascendancy, bear a strong and startling analogy to the rules of the Roman Civil Law on cognate subjects. Often the analogy is so startling as to make the careful and critical student ask himself whether it arises from mere accidental coincidence or is it the result of mutual action and reaction? It must, however, be stated that as most of the principles are derived from purely Arabian sources, the Koran and the Ahâdis, Byzantine ideas must

[1] *Gangabai* v. *Thavar Mulla,* 1 Bombay High Court Reports, p. 71 *per* SAUSSE, C. J. See also *Fatima Bibee* v. *The Advocate General*, I. L. 6 Bom. p. 42 *per* WEST, J; and *Gosain* v. *Gosain*, 6 Moo. I. A. p. 81.

have exercised little appreciable influence on the legal conceptions of the Arabian jurists.

The unhappy schism, which at this moment divides the Islamic world into the two great sects of Shiahs and Sunnis, owed its origin to secular causes which led ultimately to a wide divergence in their juridical conceptions. It originated with dynastic questions and grew into a separation on doctrinal and legal points. The great Sunni sect is divided in its own bosom into four schools; and the doctrinal and legal differences among them are as great as between the Shiahs and any one of the Sunni schools, and yet they are not regarded by each other with the same bitterness as collectively they regard the Shiahs. The reason is plain, and is to be found in the reception which the two sects accorded to the doctrine of the *Imámat*.

The question of the *Imâmat*, that is "the spiritual headship of the Mussulman Commonwealth," forms the most distinctive feature of difference between the Sunnis and the Shiahs, and gives a characteristic complexion to the juridical doctrines of the two schools. The Shiahs repudiate entirely the authority of the *Jamâèt*, (or the universality of the people,) to elect a spiritual chief who should supersede the rightful claims of the persons indicated by the Founder of the Faith, whilst the Sunnis regard the decisions of the assemblies, however obtained, as of œcumenical importance. The question came up for discussion and settlement immediately on the decease of Mohammed when it became necessary to elect a Caliph or successor to the Prophet to assume the leadership of Islàm. The Hashimites, the kinsmen of Mohammed, maintained that the office belonged by right to Ali as one who had been pointed out by the Prophet as his successor. The other Koreishites, who were traditionally hostile to the Banî Hàshim, insisted upon proceeding by

election. Whilst the Bânî Hâshim were engaged in the obsequies of Mohammed, Abû Bakr was elected to the office of Caliph by the votes of the Koreish.

Abû Bakr died in the third year of his Caliphate[1] and was succeeded by Omar *(Ibn-al-Khattáb)*. Under this Caliph the conquest of Syria, Egypt and Persia was achieved by the Moslems. Upon his decease the Caliphate was offered to Ali on condition that he should govern in accordance with the precedents established by the two former Caliphs. Ali declined to accept the office on those terms, declaring that in all cases respecting which he found no positive law or decision of the Prophet, he would rely upon his own judgment. This notable declaration forms another point of difference between the Shiahs and the Sunnis. The Caliphate was then offered to Osman who consented to the terms imposed by the electoral body. The legal divergence between the Sunni and the Shiah schools dates virtually from this epoch. The willingness of Osman to follow implicitly the precedents established by Abû Bakr and Omar without any question as to their applicability to the ever-varying exigencies of human life, impressed a distinctive character upon the Sunni doctrines. Both Abû Bakr and Omar had during their Caliphates, deferred to Ali's exposition of the law; and judgments were invariably given according to his interpretation of the traditions. Osman seems to have set a different example. This well-intentioned but weak chief, governed entirely by his secretary and kinsman Merwân, afterwards a Caliph himself, was killed, after a short and troubled reign, by the revolted Egyptian soldiery led by Mohammed the son of Abû Bakr. Upon his death Ali was elected to the Caliphate. His accession was the signal for two fierce revolts on the part of the opposite faction. The one which was headed

[1] August 634, A. C.

by Âyesha, the daughter of Abû Bakr, was suppressed without much difficulty: the other was more successful. Osman had, during his lifetime, appointed one of his kinsmen Muâwiyah, the son of Abû Sufiân, to the governorship of Syria. This ambitious chief perceived in the murder of Osman an opportunity for his own aggrandisement; and the insurrection raised by him proved, indirectly, the cause of the many disasters which have befallen Islam. Defeated in several consecutive battles, he appealed to arbitration which was agreed to by Ali with the object of avoiding further bloodshed. Abû Mûsa al-Âshâry was appointed arbitrator on behalf of the House of Mohammed, and Amr-ibn-ul-Âs on behalf of Muâwiyah. Amr persuaded Abû Mûsa that, with the view of healing the wounds which the differences between Ali and Muâwiyah had inflicted on the Moslem world, it was necessary to set aside both chiefs and elect another Caliph. Abû Mûsa agreed to the suggestion, and on the people assembling to hear the verdict of the arbitrators, he pronounced the deposition of both Mûawiyah and Ali. He was followed by Amr-ibn-ul Âs, who declared that he agreed with Abû Mûsa in deposing Ali, but that he confirmed Muâwiyah in his office. The boldness of the artifice, and the shamelessness with which it was carried into effect, struck with dismay all those who had seen in the arbitration a means for preventing further bloodshed in Islâm. This proceeding of Amr-ibn-ul-Âs exasperated the Fatimides, and both parties separated vowing undying hatred towards each other. Ali was shortly after assassinated whilst engaged in prayer in a mosque at Kûfa.[1] His assassination enabled Muâwiyah to consolidate his power both in Syria and Hijaz.

[1] See Note II at the end of this Introduction, where Mr. Justice Arnold's remarks on the claims and position of Ali, "the most heroic of that time most fruitful in heroes," are quoted at some length.

LECTURE I.

Until the accession of this chief to the office of the Caliphate, which the stern virtues of the early Caliphs had sanctified and adorned, no distinctive appellation was assigned to or assumed by either party. The partisans of Ali were known simply as the Banî-Hâshim. Under Muâwiyah, the followers of the House of Mohammed began to be called "Shiahs" or "adherents;[1]" whilst the faction which advocated the principle of election in preference to hereditary succession adopted the name of *Ahl-i-Sunnat wa Jamaet* ("People of the Traditions and the Assembly"). The Fatimides adopted green, the colour of the Prophet, as the symbol of their cause; the Banî Ummiah, on the other hand, assumed white for their standard. Up to this time the divergence between the two factions was chiefly political and dynastic. Their doctrinal and legal differences began now to assume the type and proportions they retain at the present moment. The Shiahs reject not only the decisions of the œcumenical Councils, but also all traditions not handed down by Ali or his immediate descendants—those who had seen the Prophet and held familiar intercourse with him.

The Mahommedan Law is founded essentially on the Koran. It contains the fundamental principles which regulate the various relations of life; the religious, civil, and criminal laws which provide for the constitution and continuance of the body politic; and even the germs of political rules and social economy. The absence of a systematic arrangement, which has frequently been considered as its greatest defect, is explained by the circumstance that the Code was gradually built up during the lifetime of the Prophet. The moral principles and the legal rules, which make up the work, were enunciated,

[1] In the *Jawâhir-ul-Kalâm*, the term "Shiah" is explained as meaning "a propagator of the true doctrine."

not simultaneously as a completed Code of Law, but in accordance with the exigencies of the moment and the requirements of each special case. Lecture I.

According to the Shiah doctrine, the oral precepts of the Prophet are in their nature supplementary to the Koranic ordinances, and their binding effect depends on the degree of harmony existing between them and the laws of the Koran. Thus, those traditions which seem to be in conflict with the positive directions in the text are considered to be apocryphal. The process of elimination is conducted upon certain recognised principles founded upon logical rules and definite data. These rules have acquired a distinctive type among the Mutazalâs, who have eliminated from the Hadìs Kudsî, (the holy traditions,) such alleged sayings of the Prophet as appeared incompatible and out of harmony with his developed teachings, as explained and illustrated by the philosophers and jurists of his race.

The Sunnis, on the other hand, base their doctrines on the entirety of the traditions. They regard the concordant decisions of the successive Caliphs and of the general assemblies, (Ijmaá-i-Ummat,) as supplementing the Koranic rules and regulations, and as almost equal in authority to them.

According to the Sunni doctrines, the sources of the Mahommedan Law are invariable in their order and limited in their number. With reference to these fundamental bases of jurisprudence, as they are called, there is little or no divergence among the several branches of the Sunni school, though they differ much in their mode of interpretation and exposition of the laws. (1) The Koran; (2) The Hadîs or Sunnat, (traditions handed down from the Prophet); (3) the Ijmaâ-i-Ummat, (concordance among the followers); and (4) the Kiyâs, (private

judgment,) constitute the bases upon which Sunni jurisprudence is essentially founded. The Hadîs (pl. Ahâdîs) embraces (*a*) all the words, counsels, and oral laws of the Prophet (Kawl); (*b*) his actions, his works, and daily practices (Fyl); (*c*) and his silence (Takrir) implying a tacit approbation on his part of any individual act committed by his disciples. The rules deduced from these subsidiary sources vary considerably in respect of the degree of authority which is attached to them. If the rules, or traditional precepts, are of public and universal notoriety (*Ahádís-i-mutwáttirèh*,) they are regarded as absolutely authentic and decisive. If the traditions, though known publicly by a great majority of people, do not possess the character of universal notoriety, they are designated as *Ahádís-i-mushoora;* whilst the *Akhbâr-i-wâhid*, which depend for their authenticity upon the authority of isolated individuals, have little or no value attached to them. Thus, every tradition purporting to be handed down by the contemporaries and companions of the Prophet, regardless of their actual relationship to him, is considered to be authentic and genuine, provided certain arbitrary conditions, framed with the view of testing the value of personal testimony, are complied with.

(3). *Ijmaá-i-ummat* implies general concordance. Under this collective name are included all the apostolic laws, the explanations, glosses, and decisions of the leading disciples of the Prophet, especially of the first four Caliphs (the Khulafài Ràshidîn) on theological, civil and criminal matters.

(4). *Kiyâs,* the exercise of private judgment forms the principal point of difference among the four sub-divisions of the Sunni school of jurisprudence.

The Shiahs do not admit the genuineness of any tradition not received from the *Ahl-i-Bait* (the people of

the House.) consisting of Ali and Fâtima and their children, and repudiate entirely the validity of all decisions not passed by their own spiritual leaders and Imâms. In the application of private or analytical judgment, and in drawing conclusions from the ancient precedents, they also differ widely from the Sunnis.

The persecutions to which the Shiahs have been, from time to time, subjected,—have created a marked impression upon their legal conceptions regarding the connection between the secular and the spiritual power, the Church and the State.[1] Partly in consequence of the mysterious disappearance of their last Imam, and the existing belief that he is still alive and will reappear to overthrow the enemies of Islam, and partly owing to the frequent repression from which they have suffered, the Shiahs have entirely dissociated the secular from the spiritual power. In Shiah countries, the Church and the State are entirely distinct from each other. Though a Shiah sovereign bows to the authority of the Mujtahids (expounders of the law), he submits to them not so much as spiritual chiefs, but rather as counsellors whose views should be adopted in secular matters as the reflex probably of the opinions of the Invisible Leader or Imam. Until the Saffavian sovereigns made the Shiah creed the State religion of Persia, it was the religion of a persecuted and hated sect.

The effect of this separation of the spiritual from the temporal power is most clearly marked in the doctrine of escheats. According to the Shiahs there is no escheat to the *Bait-ul-Mâl* (the public treasury). The idea of a *Bait-ul-Mâl* is "abhorrent" to the Shiah creed. All escheats, which occur only in cases where the deceased leaves no possible heir, go to the spiritual Imâm, and in his absence *(ghibat)* to his representative (the Mujtahid),

[1] 1 D'Ohsson, Tableau generale de l' empire Ottoman, p. 76.

LECTURE I. who distributes the proceeds among the poor of the intestate's native city.

The Shiahs are divided into several sub-sections. For example, the *Asná Asharyas* or *Imámias*, (the followers of the twelve Imâms), the *Ismailyas*, the followers of Ismail, one of the sons of Imam Jâfar-i-Sadik (the sixth Imam),[1] the *Zaidyas*, the *Batinyas* (the allegorists) &c. They differ from each other not so much on the interpretation of the law as on doctrinal points. The school of the Mutazalás regarded by Shahrastani and others as an offshoot from the Shiah branch, differs from the parent stock in essential particulars. The rise of this independent school forms one of the most interesting features in the history of Islam. It originated in the secession of Wâsil ben Ata, a contemporary of Abû Hanifa from the doctrines taught by Imam Hassan al Basri (of Bussorah).

Hassan was educated in the school of the early Fatimide philosophers and the liberality of his views contrasted remarkably with those of his age. Wasil had imbibed his knowledge at the same source, but he separated from Hassan on the question of free-will and predestination, and founded a school of his own. His dis-

[1] Mr. Justice Arnould in his splendid and learned judgment in the great Khojah case, *the Advocate General ex relatione Daya Muhammad* v. *Mohammed Hussen Husein*, has with such remarkable felicity and clearness traced the rise of the Ismailya sect, that I can do no better than quote a passage here, leaving the more searching student of the history of Mahommedan sects to read the judgment for himself. The learned Judge answering the question who are the Shiah Imami Ismailis (the name by which the Ismailis are known among themselves,) says, "formally they are those among the Shiahs who hold Ismail, the seventh in descent from Ali to have been the last of the revealed Imams, and who also hold that, until the final manifestation of Ali, who (as an incarnation of God) is to come before the end of all things to judge the world—the masnad of the Imamat (or in Latin idiom the office of Supreme Pontiff) is rightfully held by an hereditary succession of *unrevealed* Imams, the lineal descendants of Ali through Ismail," 12 Bombay, 323.

ciples have, from the fact of his secession, assumed the designation of Mutazalâs or Ahl-ul Itizâl (Separatists or Protestants). Wâsil soon formulated the principles which constituted the basis of his difference from the other existing schools. His impulsiveness often led him to overstep the limits of moderation in his antagonism to intellectual tyranny, yet the general rationalism which distinguished his system of philosophy and jurisprudence from every other attracted the most advanced and cultured minds to his side. Imam Zamakhshri (the author of the Kashshâf,) Abu'l Hassan Ali al Massoudi,[1] "Imam, historian and doctor," Mirkhond and Khondamir, authors of the *Rouzat-us-Safa* and *Habib-us-Siyar* were all Mutazalâs. There can be no doubt, that the moderate Mutazalâs represented the views of of Ali and the most liberal and learned of his early descendants, for the doctrines of the Fatimides bear a strong analogy to those of the school founded by Wasil and reformed by Zamakhshri.[2]

It is a well-known fact that the chief doctors of the Mutazalâs were either Fatimides themselves or were educated under the Fatimides. The Mutazalâs maintain that justice is the animating principle of human actions, justice being the embodiment in action of the dictates of reason. They maintain further that there is no eternal, immutable law as regards the actions of man, and that the divine ordinances which regulate his conduct are the fruits of individual and collective development; that, in fact, the commands and the prohibitions, "the promises and the threats," which have been promulgated among, or

[1] The author of the Murawaj-uz-zaheb, "the field of gold."

[2] The great author of the Kashshâf, a most important, learned and well-reasoned commentary on the Koran "a production the like of which," says Ibn-i-Khallican, "had never before appeared on the interpretation of the Koran." Imam Zamakhshri was born in 1075 A. C. and died in 1144 A. C.

LECTURE I. held out, to mankind, have invariably been in consonance with the progress of humanity, and that the law has always grown with the growth of the human mind. The doctrines of the *Ahl-ul Itizâl* were adopted by Abdullah-al-Mámún. He and his two immediate successors strived to introduce the Mutazalite philosophy and theology throughout the Moslem world. Unfortunately for Islam, patristicism proved too powerful even for those sovereign pontiffs, and the triumph of a factitious orthodoxy, opposed to all improvement and progress under the bigot Mutawakkil, led eventually to the downfall of the Caliphate.

The Indian Shiahs are chiefly *Asnâ Asharyas* or *Imâmias.* The Khojahs of Bombay are *Ismailyas*, but they may well be left out of consideration, as on legal questions they are for the most part governed by Hindu customs.[1] The *Asnâ Asharyas* are divided into two sub-sections, the *Usuli* and the *Akhbâri*, namely, (1) those who adhere to certain principles of interpretation laid down by the Mujtahids (the jurists of their school), and (2) those who absolutely deny the influence of authority on matters of opinion unless such authority should be in harmony with the dictates of reason and judgment. The *Akhbâris* allow the exercise of *Kiyâs* (private judgment) on every legal question, and as will be seen hereafter coincide in this respect with the principal Sunni school. In their interpretation of the law and their acceptance of the doctrine of evolution they closely resemble the Mutazalâs.

In A. H. 905, (A. C. 1499,) Shah Ismail Saffavi, the great founder of the Saffavian dynasty, adopted the Shiah doctrines as the national religion and law of the Persians, which have continued so from that period until the present

[1] Shivji-Hasan *v.* Datu Mavji Khoja, 12 Bom. Reports, p. 281; see also Hirbai *v.* Gorbai, *ibid.* p. 294. The pending legislation will have the effect of crystallizing these anti-Mahommedan customs.

time, notwithstanding the violent efforts of the Afghan usurper Ashraf and the cruel Nadir Shah to substitute the Sunni creed. Until the return of Humâyûn from Persia in the year 1555, the Shiahs were confined chiefly to the kingdoms of Bijapur and Golconda. The Bahmani and Adilshahi sovereigns were Shiahs, and with the doctrines of the Persians they had also borrowed Persian culture. When Humâyûn returned to India after the death of Sher Shah Suri, he is alleged to have come back pledged to introduce the Shiah doctrines into India in return for the Persian support. Whatever truth there may be in this report, there is no doubt that many learned men came to India with Humâyûn from Persia, and began establishing themselves in India. Shiaism began to spread among the people, though the religion of the State continued to be Sunni. Shah Shujah, Shah Jehan's second son, was a Shiah. In 1847, King Amjad Ali Shah made the Shiah religion the State religion in Oudh.

There are now many Shiahs in Hejaz, and in the eastern portions of Arabia. Historically, the Shiah school dates further back than that of the Sunnis.

The four principal schools of law among the Sunnis, named after their founders, originated with certain great jurists to whom has been assigned the distinguished position of *Mujtahid Imams*, namely, Expounders of law. By virtue of their learning and their eminence, they were entitled not to be bound in the interpretation of the law by any precedent, but to interpret it according to their own judgment and analogy (*kyâs*). Though the doctrines of these schools are essentially the same as regards fundamental dogmas (*usûl*,) they differ from each other in the respective weight allowed to *kyâs*, and the application of private judgment in the interpretation and exposition of the law.

LECTURE I.

The founder of the first distinctive juridical school among the Sunnis was Abû Hanifa. He was born in the year 80 of the Hijra (Hegira), during the reign of Abdul Malik ibn Merwan, was educated in the Shiah school of law, and received his first instructions in jurisprudence from Imam Jâfar-i-Sadik (the sixth Imam of the House of Mohammed). He received his knowledge of the traditions from Abu Abdullah ibn al Mubarak and Hamed ibn Suliman. This great jurist often quotes the Shiah Imam as his authority. On his return to his native city of Kufa, though he continued to remain a zealous and consistent partisan of the House of Ali, he seceded from the Shiah school of law, and founded a system of his own diverging completely on many important points from the doctrines of the Shiahs; and yet so close is the resemblance between his exposition of the law and their views, that there is no reason for doubt as to the source from which he derived his original inspiration. The latitude which he allows to private judgment in the interpretation of the law seems to be unquestionably a reflex of the opinions of the Fatimide doctors. Abû Hanifa died in the year A. H. 150. The school which he founded goes by the name of Hanafi and is in force among the major portion of the Indian Mussulmans, among the Afghans, Turkomans, almost all Central Asian Mahommedans, the Turks and Egyptians. In fact, his school owns by far the largest number of followers. Abû Hanifa's teachings were simplified, illustrated and explained by his two great disciples, Abû Yusuf and Mohammed.

Abû Yusuf, Yakub ibn Ibrahim al Kufi was born in A. H. 113 (A. C. 731) and died at Baghdad in A. H. 182 (A. C. 798). He was a pupil of Abû Hanifah and was first appointed to the office of Kazi of Baghdad by the Caliph al-Hàdi; subsequently he was raised to the dignity

of Kàzi ul-Kuzzâ t or Chief Civil Magistrate by the Caliph Hârûn-ar-Rashîd, being the first who held that high office.

Abû Abdullah Mohammed ibn Hussain-ash-Shaibani was born at Wasit in Mæsopotamia in A. H. 132 (A. C. 749) and died at Rai in A. H. 187 (A. C. 802). The Imam Mohammed, as he is most generally called, was a fellow pupil of Abû Yusuf under Abû Hanifah, and on the death of the latter pursued his studies under Abû Yusuf. He has left a number of works upon which commentaries have been written by some of the foremost jurists of the Hanafi school.

The *Jáma-al-Kabir*, forming the first of the Zâhir-ur-Rawâyat, contains a body of most important questions of jurisprudence, and has been commented upon, among others, by the celebrated "the sun of the learned," *Shams-ul-Aimmah*, Abû Bakr Mohammed as-Sarakhsi (of Sarakhs,[1]) who died in A. H. 490 (A. C. 1096) and Burhan ud-Din Mahmud Ben Ahmad, each of whom composed a work entitled *Al-Muhit* (*the ocean*).

The *Jáma-as-Saghir*, the second of the works of the Imam Mohammed is perhaps even more celebrated than the Jâma-al-Kabir. "In its composition" says Morley, "he seems to have been chiefly indebted to Abû Yusuf." The commentaries on the Jâma-as-Saghir are very numerous, the best known is by the *Shams-ul-Aimmah*, and another is of some note by Burhan-ud-Din-Ali, the author of the Hedayah.

The *Mabsût* (*fi-Furu-ul-Hanafiyah*) is another work of great note by Mohammed.

[1] Sarakhs which now forms a debatable ground between Afghan, Persian and Russ, and which Vambery describes as utterly ruined, in former times under the prosperous rule of the Samanides and their immediate successors was the centre of a great civilisation. Compare D'Ohsson throughout; his chapter on Mahommedan jurisprudence is the most brilliant contribution to the history of knowledge.

LECTURE I. The *Ziyâdat* (*fi-Furu-ul Hanafiyah,*) the fourth of "the Conspicuous Reports" (the *Zâhir-ur-Rawâyat*) is said to have been composed under the inspection and with the approbation of Abû Yusuf. It is a work highly esteemed, and together with its supplement by the same author has been commented upon by a multitude of writers amongst whom are as-Sarakhsi and Kazi Khan Hassan ibn Mansur al-Uzjandi, who died in A. H. 592 (A. C. 1195).

The fifth of the *Zâhir-ur Rawâyat* is called the *Siyar-al Kabir-wa-as Saghir* and is supposed to have been the latest work of its author.

The *Nawâdir*, the sixth and last of the known compositions of the Imam Mohammed, "though not so highly esteemed," says Morley, "as the others, is still greatly respected as an authority." Particularly and so far as secular law is concerned the two disciples have eclipsed the fame of the great Imam, and their authority in temporal matters is undisputed. As Sir William Jones says, "that although Abû Hanifa be the acknowledged head of the prevailing sect, and has given his name to it, yet so great is the veneration paid to Abû Yusuf and the lawyer Mohammed that, when they both dissent from their master, the Mussulman judge is at liberty to adopt either of the two decisions which seem to him the more consonant to reason and founded on the better authority."[1]

Whatever may have been the view in former times regarding the respective authority of Abû Hanifa and his disciples, there is a general consensus of opinion among modern lawyers that his dicta should be followed only in religious matters. In the *Hamâdiah* it is stated that "the Futwâs, (law decisions or opinions,) are given primarily according to the doctrine of Abû Hanifah,

[1] Sir William Jones's works, vol. III, p. 510; 1, Harrington's Analysis, p. 228; Fatâwa Hamâdiah, p. 175.

next according to Abû Yusuf, next according to Imam Mohammed, next according to Ziffer, and then according to Hassan ben Ziyâd. It is said that if Abû Hanifah be of one opinion and his two disciples of another, the Mufti is at liberty to choose either, but the preceding rule must be observed when the Mufti is not a scientific jurist (and therefore not competent to judge of the opposite opinions). This is copied from the *Kunya*. In judicial decrees, however, a preference is given to the doctrine of Abû Yusuf (who was an eminent judge), for Imam Sarakhsi has declared it safe to rely upon Abû Yusuf in judicial matters, and that the learned have followed him in such cases, though if there be a difference between the two disciples whoever agrees with Abû Hanifah must be preferred. The joint opinion of the Disciples may also be adopted, though different from that of Abû Hanifah, if the difference appear to proceed from a change of human affairs, (lit. a change of men and alteration of times;) and modern lawyers are agreed that the doctrine of the two disciples may be adopted for adjudication in matters of civil justice."

Dealing with the duties of the Mufti (Jurisconsult and Judge), Kazi Khan speaks thus, "if it is a question on which our masters are disagreed, then it must be seen whether any of the disciples is in agreement with Abû Hanifa. In that case, the opinion of Abû Hanifa and of that disciple who agrees with him should be adopted, because the arguments are strong on their side. If both the disciples disagree from Abû Hanifa, then it must be considered whether their disagreement arises from change in the times, that is, whether the decision should be in accord with the requirements of the especial circumstances of the time and place and people; when that is so, the opinion of the two disciples

LECTURE I. should be followed, for there is always a change in the conditions of mankind. In matters, however, of cultivation, transactions and such like, the views of Abû Yusuf should be adopted."

In the case of *Doe dem Jaun Bibee and another* v. *Abdullah Barber*,[1] on a question relating to the law of Waqfs, the Supreme Court (Ryan, C. J., and Grant, J.,) held that it clearly appeared to them, according to the modern doctrine of Mahommedan decisions and lawyers, that Abû Yusuf's opinion on the point in question was to be considered the better law.

After Abû Hanifa and his two disciples, the next in authority among the Hanafis of India are the Imam Ziffer ibn al-Hazil, Chief Judge at Basrah where he died in A. H. 158 (A. C. 774); and Hassan Ben Ziyâd. These lawyers were contemporaries, friends and scholars of Abû Hanîfah and their works are quoted as authorities for that Imam's doctrines particularly in matters upon which the two disciples are silent.[2]

Among the Hanafi jurists of the second and third rank, the following are the most noted :—

Abû Bakr Ahmad ibn Omar al-Khassâf was the author of the most celebrated of several treatises known by the name of *Adâb-ul Kazi* (the Duties of the Kazi or Judge). He died in A. H. 261 (A. C. 874). The most esteemed commentary on Khassaf's Adâb-ul-Kazi is that of Omar Ben Abdul Aziz Ben Mazeh commonly called Hussam Shahid who was killed in A. H. 536 (A. C. 1141.) Al-Khassâf will be frequently referred to in the following pages.

Abû Jâfar Ahmad Ben Mohammed at-Tahâwi is one of the numerous commentators on the Jâma-as-Saghir of Imam Mohammed. He also compiled a synopsis of the

1 Fulton's Reports, p. 345.
2 D'Ohsson, I, p. 18.

Hanafi doctrines called the *Mukhtasar-at-Tahâwi.* Both works are quoted as authorities, but they are not easily available in India. At-Tahâwi died in A. H. 321 (A. C. 933). Lecture I.

Al Kudûri (Abû Hussain Ahmed Ben Mohammed) is another eminent jurist. His *Mukhtasar*[1] is a work of great weight and authority in India. "Indeed it is in such general repute that Haji Khalifah when speaking of those several works which are emphatically designated by autonomasia, 'Al Kitab' or 'the Book," says that if in matters connected with jurisprudence such expression be used, it signifies the *Mukhtasar al Kuduri.*"[2] It is a general treatise on law and contains upwards of twelve thousand cases. It is only natural that a work of such celebrity should have been commented upon by numerous writers: several of the commentaries upon it are quoted in the Fatâwa-al Alamgiri. Al-Kuduri died in A. H. 428 (A. C. 1036).

There is a well-known commentary on the *Mukhtasar-al-Kuduri,* entitled *al-Jouharat-un-Nâyirèh,* sometimes called *al-Jouharat-ul-Munirah.* Barthe says that this work, though of later date than the Hedayah, is perhaps more valuable in some respects.

Shams-ul-Aimmah Abu Bakr Mohammed as-Sarakhasi, mentioned above as the author of commentaries upon the *Jáma-al-Kabir and the Jáma-as-Saghir* of the Imam Mohammed and of other works, whilst in prison at Uzjand compiled a law-book of great merit entitled the *Mabsût.* He was also the author of the most generally quoted of the many works entitled *al-Muhit,* from the *Mabsût,* the *Ziyâdat* and the *Nawâdir* of the Imam Mohammed.

Burhân-ud-Din Mohammed ibn Ahmed already men-

[1] Frequently referred to in the Alamgiri.

[2] Morley's Digest, I, Introd. p. cclxv.

tioned, also wrote a *Muhît* which though known in India is not so highly esteemed as the *Muhît-as-Sarakhsi*. The work of Burhan ud-Din Mohammed is commonly known as the *Muhît-ul-Burhani* and is taken principally from the *Mabsût*, the *Jâmas*, the *Siyar* and the *Ziyâdat* of the Imam Mohammed. The author also utilized the *Nawâdir* of the same doctor in composing his work.

The Shaikh Ala-ud-Din Mohammed as-Samarkandi composed a compendium of Al Kudûri's *Mukhtasar* which he entitled the *Tuhfat ul Fukaha*. The work of Ala-ud Din was commented upon by his pupil Abû Bakr ibn Masaûd-al-Kashâni who died in A. H. 587 (A. D. 1191). This comment is entitled *Badâia-as-Sanâia*. Both the text and its comment are frequently referred to as authorities.

The Hedâyah is one of the most celebrated treatises on Hanafi law. It is a commentary on the *Badaia-al-Mubtada;* and both the text and comment are from the pen of Burhan-ud-Din Ali ibn Abû Bakr al-Marghinani, (of Marghinan, in Ferghana), who is said to have spent thirteen years in compiling the Hedayah. He died in A. H. 593 (A. C. 1196).

The Hedayah has been illustrated by a large number of commentaries, the first of which was written by Hamid-ud Din Ali al-Bukhari, who died in A. H. 667 (A. D. 1268) and is a short tract entitled the *Fawâid*. The glosses of the Hedayah which are most reputed in India are the *Nihâyah*, the *Inâyah*, the *Kifâyah* and the *Fath-al-Kadir*.

The first of these composed was the *Nihâyah* of Hisam-ud-Din-Husain ibn Ali, who is said to have been a pupil of Burhan-ad-Din Ali, and it is important as supplying the omission of the Law of Inheritance in the Hedayah, although the chapter on this subject is supposed not to be equal in authority to the *Farâiz us Sirajiyah*.

There are two commentaries on the Hedayah entitled the *Inâyah,* but the one more commonly known by that name was written by the Shaikh Akmal-ud-Din Mohammed ibn Mahmud who died in A. H. 786 (A. C. 1384). The *Inâyah* and *Kifâyah* are both much esteemed for their studious analysis and interpretation of the text. The Hedayah was translated into Persian and subsequently into English by Mr. Hamilton under the auspices of Warren Hastings.

The most celebrated of the law works published in Turkey is the *Multaka-ul-Abhar* by the Shaikh Ibrahim ibn Mohammed-al Halabi[1] (of Aleppo,) who flourished under Solyman The Magnificent, and died in A. H. 956 (A. C. 1549). This work, which is an universal code of the Hanafi, contains the opinions of the four chief Mujtahid Imams and illustrates them by those of the principal jurisconsults of that school. Throughout Turkey, it is more frequently referred to as an authority than any other treatise on jurisprudence.

The *Multaka-ul-Abhar* was published in the original Arabic at Constantinople in A. H. 1251 (A. C. 1835), and a commentary on it entitled the *Majma-al Anhar* by Abd-ur-Rahman ibn Shaikh Mohammed, commonly known by the name of Shaikh Zada, was published at the same metropolis in A. H. 1240 (A. C. 1824).

Mulla Khusru,[2] who is one of the most renowned of the Turkish jurisconsults completed his great work called the *Durrur-ul-Akhâm* in A. H. 883 (A. C. 1478). As an authority it is second only to the *Multaka-al-Abhar* and is frequently referred to in the later works.

By far, however, the most practical and well-reasoned

[1] D'Ohsson compiled his own magnificent Digest from this work.

[2] And in A. H. 885 (A. C. 1480.)

 treatise on the Hanafi doctrines is the *Radd-ul-Muhtar*, a commentary on the *Durr-ul-Mukhtar*, (itself a work of great merit), by Mohammed Amîn (the Syrian) who flourished under Amurath IV.

The founder of the second school of law among the Sunnis was (Abû Abdullah) Mâlik ben Ans, whose tenets are in force in Northern Africa especially in Morocco and Algeria. He died in the year A. H. 179 during the reign of Hârûn-ar-Rashîd. The best known writer on the tenets of this school was Sidi Khalil, whose encyclopædic work has been translated into French under the patronage of the French Government by M. Perron.

Shâfeï was the founder of the third school. He was born at Ghizah in Syria in the same year in which Abû Hanifa died. He died in Egypt in the year A. H. 204 (A. C. 819) during the Caliphate of Al-Mamun. He was a contemporary of the Shiah Imam Ali Musa ar-Reza. Shâfeï's doctrines are generally followed in Northern Africa, partially in Egypt, in Southern Arabia, in Java and the Malayan peninsula generally and among the Mussulmans of Ceylon. His followers are also to be found among the Borahs of the Bombay Presidency. Among the Shâfeï works of repute, are the following:—

(1) The *Mukhtasar* of Abû Khoja:

(2.) The *Taqrîb* of Shams-uddin Abû Abdullah ibn Kasim al Ghazzí.

(3.) The *Muharrar* of Abu'l Kâsim Abd-ul-Karîm ibn Mohammed ar-Râfî; and

(4.) The *Minhâj-ul-Talibîn* of Mohi-ud-din Abû Zakaria Yehya ibn Sharaf an-Nawâwi (who died in A. H. 676). This work has been recently published with a learned

[1] Called among the Indian Mahommedans, the Shâmi or Syrian on account of the author being a native of Damascus.

translation into French by M. Van Den Berg, under the authority of the Dutch Government. LECTURE I.

The fourth school was originated by Ibn-i-Hanbal. It flourished during the reigns of Al Mâmûn and his successor Mutassim Billâh. These two Caliphs were Mutazalâs. Ibn Hanbal's extreme fanaticism, and the persistency with which he tried to inflame the bigotry of the masses against the sovereigns brought him into trouble with the rulers. He died in the odour of great sanctity in the year A. H. 241. Ibn Hanbal and his patristicism are responsible for the ill-success of Mâmûn in introducing the Mutazalâ doctrines throughout the empire; and for the frequent outbursts of persecution which deluged the Mahommedan world with the blood of Moslems.

Abû Hanifa, Malik, Shâfeï and Ibn Hanbal are the founders of the four orthodox schools among the Sunnis *(the Muzâhib-i-arbaa)*. Their doctrines are essentially the same as regards the fundamental dogmas *(usûl,)* though they differ from each other in the application of private judgment and in the interpretation and exposition of the Koran.

Shâfeï, Malik and Ibn Hanbal almost entirely exclude the exercise of private judgment in the exposition of legal principles. They are wholly governed by the force of precedents; they do not admit the validity of a recourse to analogical deductions, or of such an interpretation of the law whereby its spirit is adapted to the special circumstances of any particular case. Their followers are accordingly designated *Ahl-ul-hadis* (traditionists par excellence).[1]

The exercise of private judgment, consecrated by the Prophet and adhered to strictly by his immediate descendants, had induced the development of a liberal spirit

[1] Prolégomènes d'Ibn Khaldun.

LECTURE I. among the Fatimides and this had its legitimate influence on the mind of Abû Hanifa. The value which he and his disciples attach to the exercise of *Kiyâs* is proved by a series of passages given in the Fatâwa-i-Alamgiri. The followers of Abû Hanifa are styled *Ahl-ur-Rai wal Kiyâs* (people of judgment and reason).

Ibn Khaldun, one of the greatest critical scholars and jurists among the Mussulmans, speaks thus of the latitude given to reason or analytical judgment by the followers of the several Sunni schools. "The science of jurisprudence forms two systems, that of the followers of private judgment and analogy (*Ahl-ar-Rai-wa-al Kiyâs*,) who were natives of Irâk and that of the followers of tradition, who were natives of Hijaz. As the people of Irâk possessed but few traditions they had recourse to analogical deductions and attained great proficiency therein, for which reason they were called the followers of private judgment; the Imam Abû Hanifah who was their chief, had acquired a perfect knowledge of this system and taught it to his disciples. The people of Hijaz had for Imam, Mâlik ibn Ans and then Ash-Shâfeï. Some time after, a portion of learned men disapproved of analogical deductions, and rejected that mode of proceeding, these were the *Zahiris* (followers of Abu Dawûd Sulaiman), and they laid it down as a principle that all points of law should be taken from the *Nusûs* (text of the Koran and traditions) and the Ijmaâ (universal concordance of the ancient Imams)."

The early Hanafi jurists declared in explicit terms the necessity for the exercise of private judgment in the exposition of the law and the administration of justice. And in this they approached closely the doctrines of the Akhbâri Shiahs.

Râzi-ud-Din Nishapuri has declared in his *Muhit*, "If

the concurrent opinion of the Companions be not found in any case, which their contemporaries may have agreed upon, the Kazi must be guided by the latter. Should there be a difference of opinion betwen the contemporaries, let the Kazi compare their arguments and adopt the judgment he deems preferable. If, however, none of the authorities referred to be forthcoming and the Kazi be a person capable of analogical deduction (*Ijtihâd*), he may consider in his own mind what is consonant to the principles of right and justice, and applying the result with a pure intention to the facts and circumstances of the case, let him pass judgment accordingly." Abû Bakr ibn Masaûd al Kâshâni has stated in the *Badâia*, "Where there is neither written law nor concurrence of opinions for the guidance of the Kazi, if he be capable of legal disquisition and have formed a decisive judgment in the case, he should carry such judgment into effect by his sentence although other scientific lawyers may differ in opinion from him, for that which upon deliberate investigation appears to be right and just is accepted as such in the sight of God." And again, a third passage may be quoted to the same effect from the last mentioned work; "If in any case the Kazi be perplexed by opposite proofs, let him reflect upon the case and determine as he shall judge right, or for greater certainty let him consult other able lawyers, and if they differ after weighing the arguments let him decide as appears just."[1] These dicta furnish the amplest reply to the absurd attacks which have lately been levelled against Mahommedanism in general, that it does not contain within it any elasticity or the germs of development, for its laws are stereotyped and cramped.

Unfortunately, the conception which has obtained a

[1] Fatâwa-i-Alamgiri, III, p. 383.

LECTURE I. hold on the Sunni world, that *Ijtihâd*[1] or authoritative exposition of law by analogical deductions or the exercise of judgment, ceased in the third century of the Hejira, has exercised a most pernicious effect on the promotion and advancement of the Mahommedan communities governed by the Sunni doctrines. Among the Sunnis there are three degrees of *Ijtihâd*.[2] The jurists of the first order possessed a total independence in the exposition of law. They constituted, as it were, a connecting link between the law and their own disciples, who had no right to question their exposition of the Koran, the Sunnat and the Ijmaâ, even when apparently at variance with those elements or sources of jurisprudence. The *Mujtahids* of this first class were very frequent in the three first centuries of the Hejira, but in later times the doctrines of the law becoming more fixed, the exercise of private judgment to an unlimited extent soon ceased to be recognized.[3] Some later doctors, Az-Zâhiri and As-Suyuti for instance, claimed the right, but it was refused to them by public opinion. The *Mujtahids* of the first class, who lived in the first century of the Hejira, are esteemed as of higher authority than those who flourished in the second and third.

Those *Mujtahids*, who had arrived at the second degree of *Ijtihâd*, possessed the authority of resolving questions not provided for by the authors of the chief sects, and were the immediate disciples of the acknowledged *Mujtahids* of the first class, who, in some instances, allowed their pupils to follow and teach opinions contrary to their

[1] The word Ijtihâd signifies, in its most common acceptation, the striving to accomplish a thing, the making a great effort; but in speaking of a law doctor, it denotes the bringing into operation the whole capacity of forming a private judgment relative to a legal proposition.

[2] See Note II at the end of the Introduction.

[3] D'Ohsson, I, p. 7.

LECTURE I.

own doctrines and occasionally even adopted their views.

Those who had attained the third degree of *Ijtihâd* were empowered to pronounce sentence of their own proper authority in all cases not provided for by the founders of the sects or their disciples. Their sentences were, however, to be derived from a comparison of the Koran, the Sunnah and the Ijmaâ taken conjointly with the opinions of the *Mujtahids* of the first and second classes, and they were not authorised to controvert their published doctrines either respecting the elements of the law or the principles derived therefrom. The *Mujtahids* of the third class were required to possess a perfect knowledge of all the branches of jurisprudence according to the doctrines of all the schools, and the class comprises a large number of doctors of greater or less celebrity, some of whom were raised to the rank during their lifetime, but the greater portion after their decease.[1]

As a title the term *Mujtahid* has long since fallen into disuse amongst the Sunnis.

The present stationary condition of the Mahommedan nations, as compared with their rapid progress in the early centuries of Islam, is due principally to this conception regarding *Ijtihâd*, and the general view that no person who has not attained to that factitious eminence or empirical stage of juridical knowledge possessed by the *Mujtahids* of the first three centuries can aspire to freedom of legislation or liberty of judgment.

Among the Shiah communities also the same blight has fallen over the ideas of men by the general adoption of *Usûli*, in preference to, or supersession of, the *Akhbâri* doctrines. The freedom of judgment allowed by the latter school gave ample scope to social progress and moral development.

[1] Fatâwa-i-Kazi Khan, I, p. 1.

The *'sûli* submits himself implicitly to the law as enunciated by its constituted expounder called in Shiah countries the *Mujtahid*, and rejects all liberty of thought or reason.

This suppression of the human mind has naturally given birth to that movement in Islam, symptoms of which are perceptible on all sides and which are so full of the most hopeful auguries for the future of the Moslem world. Shâfeïsm seems to have shaken off its ancient fetters, and now stands forth in the presence of the Sunnis as the embodiment of those aspirations for moral regeneration and legal reform which are agitating so many minds in Islam. In India, under the name of Rafa-eddainism, it is measuring strength with Hanafiism in its very strongholds. Whilst Mutazalâism is spreading rapidly amongst the younger minds.

With reference to the Shiah works on law, M. Querry speaks as follows:

"The rapid extension of Islam in countries peopled by "men of divers races and customs, soon necessitated an "embodiment of the traditions, and the publication of "uniform codes, applicable to every country where the "new religion reigned. The list of jurists who worked at "the compilation of the Mussulman Shiah law, from the "third to the seventh century of the Hegira, is too extensive "to give here. I shall confine myself to quoting the most "eminent of these doctors:—Sheikh Mohammed ibn Mo-"hammed ibn al-Numân Abû Abdallah, who was sur-"named El-Mofìd, because of his numerous pupils; (this "learned man, born in 333 or 338, died in 413, leaving "more than two hundred treatises); Sheikh Mohammed "al-Hassan ibn Ali Abû Jâfar el-Joussi, surnamed the "Sheikh of the Imamite faith, (under this title he is de-"signated in the work I have translated). This doctor

"lived from 385 to 460; he was the best pupil of Sheikh "Mofìd, and left numerous works, which are authoritative "wherever the Shiah doctrines are followed. Among "others we must quote the *Istebsâr*, the *Khéláf vel vefák* "(concordances and divergences), the *Nehâyet fí behr ul* "*fikh vel ferâyé*, and lastly the *Mabsût*, on which there exist "no less than eighty commentaries and glosses. We must "also mention Sheikh Syed Murteza Abu'l Kâsem Ali "ibn Abi Ahmed el-Hosseini, surnamed "Ebn ul-huda" "(the guide to the way of salvation); he was also a "pupil of Sheikh Mofid. Born in 355, he died in 436, "leaving an immense fortune, a considerable number of "works, and of poems, and a collection of eighty thousand "manuscripts. The author, or rather the compiler whose "work I have translated, Sheikh Najm ud-din Abu'l "Kâsem Jâfar Abû Ali Yahyâ, surnamed Al-Mohekkik, "takes a high place among the illustrious interpreters of "Mussulman law. This doctor was descended from a family "of celebrated jurists; he was born at Hilleh on the Eu-"phrates, in the year 602 of the Hegira. When young he "earned a great reputation for his science, his intelligence, "and the wide extent of his knowledge; distinguished "alike as a lawyer, an orator, a moralist, a poet and a writer. "It is said that Khaja Naser-uddin Tûsi, the famous astro-"nomer and minister of Hulâkû Khan, who accompanied "his sovereign at the capture of Bagdad, considered it an "honour to be present at his lessons, and declined the offer "of the professor, who out of deference asked him to take "the chair in his place. Al Mohekkik exercised his ma-"gisterial and professorial functions until 676, at which "time he died of a fall from the terrace of his house. He "was buried at Najaf, near the tomb of the Imam Ali, "and an immense concourse of people were present at his "funeral. This learned man wrote an abridgment of the

LECTURE I. "codes, under the name of *El-nafi;* he wrote commentaries "on the religious code, on the book of sales and the *Nehâ-"yeh* of Sheikh Joussî, his illustrious predecessor; he is "also the author of dissertations on the principles of the "Faith, on the fundamental dogmas of Islam, on the "principles of law, on logic and philology, and has left "several volumes of poems. But his principal claim to the "admiration and veneration of his co-religionists lies in his "codification of the Shiah Law, which under the title of "*"Sharâya-ul-Islam fi messâil ul-helâl vel harâm,"* (the "Mussulman disposition on points of legality and prohibi-"tions,) is adopted and followed wherever the Imamite "doctrines are in practice, especially in Persia.

"This work is divided into four parts: the first treats of "religious duties; the second of contracts and synallag-"matic obligations; the third, of unilateral acts, and the "fourth comprises the prescripts relating to hunting, food, "&c. and treats of the penalty applicable to crimes and "delinquencies, from the point of view of canonical as well "as civil law. The difference between the divers parts is "certainly not so rigorous as that which exists in our "French codes; but I did not like to diverge from the "plan followed by the author, so as to facilitate references "to the Arabic text."

There are several commentaries of the Sharâya in existence. Among these the *Masâlik-ul Afhâm* by Zain-uddin Ali as-Sâili commonly called the Shahîd-i-Sâni, (second martyr), and the *Jawâhir-ul-Kalâm* by Shaikh Mohammed Hassan an-Najafi are by far the most copious and erudite.

Among other law works of note are the *Talkhis ul-Maram*, the *Ghayat-ul-Ahkam* and the *Tahrir-ul-Ahkam* by Shaikh Allamah Jamâl-uddin Hasan ibn Yusuf ibn al Murteza al-Hilli. His *Irshâd-ul-Azhân* is also a work

of great merit and learning and is constantly quoted as an authority under the name of the *Irshád-i-Allâmah*. Lecture I.

The *Jáma-i-Abbási* is a concise and comprehensive treatise on Shiah law, in twenty books or chapters. It is generally considered as the work of Bahâ-ud-din Mohammed Âmili, who died in A. H. 1031 (A. C. 1621).

The *Mafâtîh* by Mohammed ibn Murteza surnamed Muhsan, and the commentary on it by his nephew who was of the same name, but surnamed Hâdî, are modern works deserving of notice.

The *Rouzat-ul-Ahkâm*, written by the third *Mujtahid* of Oudh, consists of four chapters. The first chapter deals with the law of Inheritance, most fully and perspicuously. This work was lithographed at Lucknow first in 1264 A. H.

Another work of great merit is the *Jáma-ush-Shattát*; which is a grand collection of decisions and dicta published within the last century in Persia by the chief *Mujtahid* of Teheran.

NOTE I.

In *Moonshee Buzloor Ruheem* v. *Shumsoon-nissa Begum*, the Judicial Committee of the Privy Council dealing with certain remarks of the Judges of the High Court of Calcutta, refusing to follow the Mahommedan Law in that case, made the following observations :—

"Their Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British India, and particularly to the enactment already referred to (Reg. IV of 1793, Sec. 15), which directs, that in suits regarding marriage and caste, and all religious usages and institutions, the Mahommedan laws with respect to Mahommedans, and the Hindu laws with regard to Hindus are to be considered as the general rules by which Judges are to form their decisions; and they can conceive nothing more likely to give just alarm to the Mahommedan community than to learn by a Judicial decision, that their law, the application of which has been justly secured to them, is to be over-ridden upon a question which so materially concerns their domestic relations;" 11 Moo. I. A. 614.

NOTE II.

The following passage from Mr. Justice Arnold's judgment in the great Khoja case may, I think, prove of some interest to the students of the history of Mahommedanism :—

"The general expectation of Islám had been that Ali, the first disciple, the beloved companion of the Apostle of God, the husband of his only surviving child Fatimá, would be the first Caliph. It was not so to be. The influence of Ayesha, the young and favourite wife of Mahomet, a rancorous enemy of Fatimá and of Ali, procured the election of her own father Abubekr; to Abubekr succeeded Omar, and to him Osman; upon whose death, in the year 665 of our era, Ali was at last raised to the caliphate. He was not even then unopposed; aided by Ayesha, Moawiyah, of the family of the Ommeiades, contested the caliphate with him, and while the strife was still doubtful, in the year A. D. 660, Ali was slain by a Kharegite, or Mussulman fanatic, in the mosque of *Cufa*, at that time the principal Mahommedan city on the right or west bank of the Euphrates, itself long since a ruin, at no great distance from the ruins of Babylon.

This assassination of Ali caused a profound sensation in the Mahommedan world. He was, and deserved to be, deeply beloved, being clearly and beyond comparison the most heroic of that time fertile in heroes—a man brave and wise, and magnanimous and just, and self-denying in a degree hardly exceeded by any character in history. He was, besides, the husband of the only and beloved child of the Apostle of God, and their two sons Hassan and Hussain had been the darlings of their grandfather, who had publicly given them the title of "the foremost among the youth of paradise."

Of these sons, Hassan, the elder, a saint and a recluse, on the death of his father sold his birthright of empire to Moawiyah for a large annual revenue which during the remainder of his life he expended in works of charity and religion at Medina. In the year A. D. 669, this devout and blameless grandson of the Apostle of God was poisoned by one of his wives, who had been bribed to that wickedness by Yezid, the son of Moawiyah and the second of the Ommeiad Caliphs of Damascus.

There thus remained, as head of the direct lineage of the Apostle of God, Hussain, the younger son of Fatimá and Ali, a brave and noble man, in whom dwelt much of the spirit of his father.

Eleven years after his elder brother's murder, in the year 680 of our era, yielding to the repeated entreaties of the chief Moslem people of Irak Arabi, (or Mesopotamia), who promised to meet him with a host of armed supporters, Hussain set forth from Medina to Cufa to assert his right to the caliphate against the hated Ommeiades. He crossed the desert with only a feeble train,—his wife, his sister Fatimá, two of his sons, and a few armed horsemen, when on reaching Kerbela, then a desert station about a day's journey from the west bank of the Euphrates and in

the near neighbourhood of Cufa, he found drawn up to meet him a host, not of retainers, but of foes. The narrative of what follows is among the most pathetic in all history. The noble son of Ali and Fatimá, the favourite grandson of the Apostle of God, after deeds of valour romantic even in an Arab of that age, fell pierced through and through with the arrows and javelins of the cowardly assailants who did not dare to come within the sweep of his arm. One of his sons and a nephew had already been slain in his sight. His other son, his wife, and his sister were carried away captive to Damascus. They smote off the head of the son of Ali, and paraded it in triumph through the streets of Cufa. As it passed along, the brutal Obeid-ullah, the governor of the city, struck the mouth of the dead man with his staff. "Ah," cried an aged Mussulman whom horror and just wrath made bold, "What a foul deed is that!—on those lips I have seen the lips of the Apostle of God."

This tragic event stirred the heart of Islám to its very depth."

NOTE III.

D'Ohsson, following Ibrahim Halebi, classifies the Sunni jurists into seven ranks. In the first rank he places the four principal Imams; with reference to the others the classification is as follows:—

SECONDE CLASSE.

Elle comprend un trés grand nombre de docteurs, dont les plus estimès sont *l'Imam Ebn Youssouph*, *l'Imam Mohammed*, *l'Imam Zufér*, *l'Imam Mezny et l'Imam Buweyly*. Ils sont presque tous disciples de *l'Imam Azam*, dont ils suivirent lésprit dans l'explication des différens points de morale et de pratique, à la réserve de quelques-uns, sur lesquels ils debitèrent des opinions opposées; une partie de ces variantes fut même adoptée par les juristes postérieurs, dans leurs codes de jurisprudence, ainsi qu'il sera expliqué plus bas.

TROISIEME CLASSE.

Les docteurs les plus notables de cette classe sont les *Imams Khassaf*, *Tahhawy*, *Hassan-Kerkhy*, *Schems'-ul-Eymet' el-houlwany*, *Es-Serakh'sy*, *Fakhr'ul Islam*, *Pezd-wy*, *Fakhr'ud-dinn*, et *Cazi-Khann*. Ils sont tous partisans et observateurs fidèles de ce qui a été generalement établi et statué par les *Imams* de la premiére classe, et expliqué par ceux de la seconde.

Ils n'ont fait qu'éclaircir et résoudre plusieurs questions omises jusqu'alors, en les développant d'après l'esprit et les décisions des quatre premiers *Imams*. Ainsi cette classe de docteurs, n'ayant rien donné de son propre fond, est, par cela mêrvie, désignée sous le nom de *tabaka-sujla*, qui signifie classe inferieure.

QUATRIEME CLASSE.

On y distingue, entre autres, *Kerkhy*, *Razy el Asshab'y*. Ils portent la dénomination particulière *Asshab-tekhridjé*, pour désigner que ces

Lecture I. juristss se sont bornés, d'un côté, á donner de l'extension aux points déja expliqués et éclaircis par les *Imams* des trois premiéres classes, et de l'autre, á en tirer des conséquences absolument dans le même esprit.

Cinquieme Classe.

Les *Imams* les plus distingués de cette classe, sont *Eby-Hassan-Coudoury* et *Sahhib-Hidayé*.. On les applle *Asshab'y-Terdjihh*, parce que leur principal mérite est d'avoir compulsé les ouvrages des précédens *Imams*, discuté leurs variantes, et fixé, par leur choix, celles qui devoient avoir la préférence.

Sixieme Classe.

Sahhib-Kenz, *Sahhib'ul-Mukhtar*, *Sahhib-ul-Medjhmâ* et *Sahhib-Wikayé*, sont les plus estimés de ces docteurs. Tout leur travail se réduit á exposer leur opinion particuliére sur le mérite des œuvres et des decisions canoniques des *Imams* de la quatriéme et cinquième classe.

Septieme Classe.

Elle contient tous les *Imams* postérieurs qui ont écrit sur le culte comme sur la jurisprudence, d'aprés l'esprit et l'opinion de ceux des six antres classes. Tels sont les fameux ouvrages de *Tatar-Khaniyé*, de *Hindiyé*, d' *Eb'ul Léyss*, de *Medjhma-ul-Bahh-reyun*, d'*Ebul-Cassim*, de *Kirahiyeth'ul-Fetawa*, &c. &c. On donne généralement á tous ces écrites le nomme de *Mutawelath*, parce qu'ils sont trés-volumineux, et qu'ils traitent fort au long de toutes les matiéres relatives á ces lois canoniques.

Cette derniere classe est censée comprendre aussi tous les docteurs et tous les jurisconsultes qui étudient la science du droit, comme sont, dit le même auteur, les *Oulemas* de nos jours, décorés, á l'égal des anciens *Imams*, des titres des *Meschaykh*, de *Foukahha*, et *d'Oulema*, c'est-á-dire anciens, juristes, docteurs ; mais jamais de celui de *Mudjhtehhid* ou interprètes sacrés.

CHAPTER I.

THE LAW RELATING TO GIFTS.

Section I.

Under the Mahommedan Law, there is no distinction between ancestral and self-acquired property; and the rights of the owner are absolute over both during lifetime. He may dispose of it in whatever way he likes. But such dispositions, in order to be valid and effective, are required to have operation given to them during the lifetime of the owner. If a gift be made, the subject-matter of the gift must be made over, actually or constructively, to the donee at the time; the donor must in fact divest himself of all proprietary rights in it, and place the donee so far as practicable in possession thereof. The power of testamentary disposition, as will be shown afterwards, is restricted to a third. Lecture II.

This restriction on the disposing powers of a Mahommedan is referred to in the following terms by the Privy Council in the case of *Rani Khujoor-unnissa* v. *Mussamut Roushan Jehan*.[1]

Rani Khujoor-unnissa v. Mussamut Roushan Jehan.

"The policy of the Mahommedan Law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part

[1] L. R. 3 Ind. Appeals, p. 307.

LECTURE II. of his property to one of his sons provided he complies with certain forms."

This restriction, which is not without analogy in certain European systems[1], is surrounded with conditions which will require great attention in the course of these lectures.

Dispositions of property divide themselves under two heads, *viz.* :—

(1) Dispositions *inter vivos*.

(2) Dispositions which are in their nature testamentary, and which are not intended to operate until after the death of the person disposing.

A disposition, however, made at a time when the disposer was suffering from a disease, which is technically called death-illness (*Marz-ul-mout*,) is treated as a testamentary disposition. But we shall discuss this in detail in due course.

The dispositions *inter vivos* with which we have principally to concern ourselves are *Wakf* and *Hiba*.

Hiba.

(*a*) A *Hiba* is the voluntary transfer, without consideration, of some specific property, (whether existing in substance or as a *chose in action*.)—This definition will be more fully explained later.[2]

Wakf.

(*b*) A *Wakf* is the settlement in perpetuity of the usufruct of any property for the benefit of individuals or for a religious or charitable purpose. The grant of the usufruct for a limited time, without consideration and resumable at will, is called an *ariat* (*commodatum*). The distinction between *Hiba* and *Ariat*, between the gift of the *corpus* or

[1] See Peterson's English and Scotch Law (1860) pp. 223—224.

[2] In the Transfer of Property Act, Gift is defined thus :—" Gift is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person called the donor, to another, called the donee and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void."

substance of a thing, and of the mere income for a limited time, was discussed at considerable length by the learned Subordinate Judge of Allyghur in the case of *Mahommed Faiz Ahmad Khan* v. *Ghulam Ahmad Khan*,[1] whose judgment was subsequently affirmed and adopted by both the High Court and the Privy Council. The judgment is so exhaustive and thorough, that I cannot do better than transcribe a portion to illustrate my meaning :—

Mahommed Faiz Ahmad Khan v. Ghulam Ahmad Khan.

Ariat.

"To make a person the owner of the substance of a thing without consideration is a *hiba* (gift), while to make him the owner of the profits only without consideration is an *ariat* or *commodatum*, (*vide Durr-ul-Mukhtar, Kitab-ul-hiba*). In a gift, it is essential that the donor should be sane, owner and of age, that the thing given be not undivided (*mushaâ*) and in possession of the donor, and that there be proposal and acceptance. A gift is not void for invalid conditions; on the contrary, the conditions are void.

"For example, if a slave be made a gift of, with the condition that the donee should set him free, the condition is void but the gift is valid, (*Durr-ul-Mukhtar, Kitab-ul-hiba*). In an *ariat*, it is not necessary that the donor should be of age, nor that the thing given should be undivided, nor is acceptance after proposal a condition, (*Alamgiri*). In the *Imadia*, it is explained that the *ariat* of a joint property is valid and so are its deposit and sale, (*Durr-ul-Mukhtar, Kitab-ul-ariat*). The words by which an *ariat* is constituted have a special chapter assigned to them in the *Alamgiri*, and I shall copy it in this place to shew what words are used in giving a thing in *ariat* and of what signification; (Second Chapter, *Kitab-ul-ariat, Alamgiri*.) If he said, 'I have made thee owner of the profits of this house for a month;" or, without saying a

[1] I. L. 3 All. 490.

month, "without a consideration," it will be an *ariat*. This is in the *Fatâwa* of Kazi Khan. And it is valid by the words:—" I lent thee this robe, thou mayest wear it for a day," or " I lent thee this house, thou mayest live therein for a year;" (*Tatarkhania.*) If he said, " I make this house of mine thy residence for one month" or, if he said, " thy residence for my lifetime," this will be an *ariat;* (this is in the *Zahiria.*) And if he said, " I made thee be borne on her for God's sake," it is an *ariat;* (*Fatâwa Kazi Khan.*) And if he said, " my house is for thee a gift by way of residence," or " a residence by way of gift," it is an *ariat;* this is so in the *Hedaya*. And if he said " my house is for thee given by way of a residence" or " a residence by way of *Sadkah* (alms)" or " a *Sadkah* by way of *ariat*" or, " a loan (*ariat*) by way of gift," all this is *ariat;* this is so in the *Kafi*. And if he said, " my house is for thee, if thou survivest me, and for me if I survive thee," or " for thee a *wakf*," it is an *ariat* according to Abû Hanifa and Mohammed, but a gift according to Abû Yusuf, and the words " *rakba*" and " *habas*" are void; this is so in *Badâia*. If he said " my house is for thee, if thou outlivest me, and for me, if I outlive thee" or " a *wakf* for thee," it will be an *ariat* according to all; this is so in *Yanabia*. " I made over this ass to thee so that thou mayest use it and feed him with grass at thy own cost," this will be an *ariat*. This is so in *Kunia*. If he said, " I have given thee this tree for eating the fruit thereof" it is an *ariat*, unless he intends a gift by it. This is so in *Tamar Tashi*.

" These are the words from which an *ariat* is construed, and it will also appear from looking at all of them that the word " *wahabto*" (I made a gift) is not found anywhere among them. The words " *hibatan suknah*" or " *suknah hibatan*" which are used above do not mean

a gift of the substance of the thing. They are only an elucidation of "*dari laka*," so that the meaning is that the house which is given is for residence. I shall now give those words which constitute a gift, and they are of three kinds. First those which are specially made (adapted) for a gift; secondly, those which denote a gift, metaphorically or by implication; and thirdly, those which import *hiba* or *ariat* equally. I copy the following from the *Alamgiri*, *Kitab-ul-hiba*, Chapter I. "The words by which gift is made are of three kinds; First, those which are specially adapted or made for *hiba;* secondly, those which denote *hiba* by implication or metaphorically; and thirdly, those which may import *hiba* or *ariat* equally. Of the first kind there are such as these:—"I made a gift of this thing to thee," or "I made thee owner of it" or "I made it for thee," or "this is for thee" or "I bestowed upon thee or gave thee this." All this is *hiba*. Of the second description are such as these—"I clothed thee in this garment" or "I gave thee this house for thy lifetime." This is gift. In the same way if he said "this house is for thee for my age," or "for thy age or for my lifetime," or "for thy lifetime, so that when thou art dead it will revert to me," then the gift will be valid and the condition void. But the third kind are such as these:—Should he say "this house is for thee," or "for me if I survive thee," or "a *wakf* for thee," and make it over to him, it is an *ariat* according to the two, Abû Hanifa and Mohammed, and a *hiba* (gift) according to Abû Yusuf. The above question shows that the word "*wahabto*," the meaning of which is "I made a gift of," is a word specially adapted for gift (*hiba*) and is not used to denote a loan. And this is the word which has been used in the document entitled *hiba-namah* (deed of gift). None of the doubtful words have

LECTURE II. been used in this document and the words used after it are by way of advice (*mashwara*). There is an example in the law-books eminently applicable to the present case, which makes it clear that the transaction in dispute was one of *hiba* and not of *ariat*. This example is to be found in all the books, in the *Hedaya*, in the *Durr-ul-Mukhtar and in the Alamgiri*:—"*darí laka hibatan taskunahu*,"—'My house is for thee by way of gift that thou mayest live in it.' It is a rule in Arabic that a verb sentence is never used as explicative (*tafsir*) of a noun sentence; '*dari laka hibatan*' is a noun sentence and '*taskunahu*' a verb sentence; '*taskunahu*' cannot therefore be explicative of the preceding sentence. On the contrary, the donor by way of advice, counsels the donee to live in it; and the latter is free to adopt the counsel or not. Among the sentences by which a valid gift may be made the following appears in the law-books:—*Durr-ul-Mukhtar*, 'my house is for thee that thou mayest live in it.' Because the words 'that thou mayest live' *(taskunahu)* are an advice and not an explanation, for a verb is not adapted to be explicative of a noun. So then he counsels him in the mode of his proprietorship by telling him to live in it. So if he likes, he can accept the advice, or he may not accept it. But if it be said, "*dari laka hibatan suknah*" or "*suknah hibatan*" as mentioned in the words used to describe an *ariat*, there "*hibatan suknah*" is a *tafsir* or explanation of ownership, contrary to "*dari laka hibatan taskunahu*" where it is not a *tafsir*. *Hedaya*:—If he said "by way of gift that thou mayest live in it," then it is a gift, for his saying "*taskunahu*," that "thou mayest live in it," is an advice, and not an explanation and it is an index of the object, unlike his saying "*hibatan suknah*" for it is *tafsir* to it. In the deed of gift, the words "made a gift

of " and put her in possession, are followed by the direction that the sister-in-law may manage the villages and apply their income to meet her necessary expences and to pay the Government revenue, this is all by way of advice and the transaction of gift concluded with the preceding words. The words *hiba kíyá* "(made a gift of)," denote their real meaning and are made use of with reference to the villages. It is a rule in every language that a word is always understood to be used in its literal meaning, though of course when the literal meaning is not applicable the metaphorical one may be understood. It is not necessary to refer to Arabic books alone for further corroboration of this fact. The word gift is perfectly applicable in its literal sense in the document, where these words are used. The donor was not a minor, nor the subject of gift *mushaâ* (undivided). There is no reason why the word *hiba* should be held to mean an *ariat* (loan) and why, when it is clearly stated that the mouzas of Sahauli and Kamalabad are made a gift of, the context should be construed to mean that the profits of the mouzas Kamalabad and Sahauli were given as *ariat*. On a perusal of the whole document, it clearly appears that Faiz Ahmad Khan never even thought of effecting an *ariat*. He has used sufficient words by which nothing but a gift could be intended. The whole manner is that of a gift, and there is not even the trace of an *ariat*. The value of the property was fixed, the full stamp-duty was paid, and lest the property should be suspected to be *mushaâ*, or undivided, and the gift vitiated on that account, he stated that "both villages are owned by me without the partnership of any one else." Then using the word '*hiba*,' he declared that he had made a gift and confirmed it, so far as to write that neither he nor his heirs shall have any claim. At the conclusion, he expressed the nature of the docu-

Lecture II. ment by saying that he had written it by way of a deed of gift. He also stated in the document that he had made over the possession to the Mussamât which is the completion of the gift (but which is not necessary in an *ariat* or loan.) He made the Mussamât execute a document in the way of *kabuliat* (acceptance) which was necessary for the validity of the gift (not necessary in an *ariat*). After the conclusion of the words of the document and writing "*fakat*" (end) the words headed "P. S. I promise" used by the defendant, further elucidated the nature of the gift and show that it was a *hiba-bil-ewaz* (gift for consideration). There is no reason why all the words should not be understood in their literal sense, and why the transaction should be considered as *ariat* (*commodatum*), about which there is no word at all in the whole document. The transaction cannot be considered to be an *ariat*, unless all the words be construed in a sense other than literal: but for this there must be a very strong reason, which the Court thinks does not exist."[1] The result of the ruling of the Privy Council in this case appears to me to be this, that "where there is an absolute gift, words describing its objects do not limit or cut down its operation."

Section II.

HIBA OR GIFT SIMPLE.

Hiba or gift simple.

Among Mahommedans, the Law relating to the subject of *hiba* possesses special importance. The principle of exclusion which prevails in all the schools from the absence of the right of representation—causes much hard-

[1] I have given this judgment *in extenso* to throw into strong relief, the distinction between *hiba* and *ariat* so clearly pointed out by the Subordinate Judge in this case.

ship. For example, if a man has three sons, one of whom dies in the lifetime of his father leaving children, these children are excluded from the inheritance by their uncles. Females under the Mahommedan law take smaller shares than sons. Under the Sunni Law especially, owing to the principle of agnacy (*tásib*) considerable injustice is frequently occasioned which it is often the endeavour of owners of property to avert in their lifetimes. The children of a daughter are excluded from inheritance in preference to brother's sons. To remedy these evils, it has become frequent among Mahommedan families in India, as elsewhere, to have recourse to *hibas*, whereby it is not only endeavoured to correct any such injustice as I have indicated, but oftentimes to give a larger share to one heir than the other. The lawfulness of giving a larger share to one heir than the other by a disposition *inter vivos* is specially recognised in the *Alamgiri.*

"If a man in health making gifts to his children should desire to give to some of them more than to others, he may lawfully do so according to Abú Hanifah, when the children in whose favour the distribution is made are superior to the others as regards religion, but when they are all equal in this respect it is abominable to make any distinction. According to Abû Yusuf, an unequal distribution may lawfully be made when there is no intention of injuring any of the children and as much should be given to a daughter as to a son. The *futwa* is in accordance with this and it is approved. But if a man in health should give the whole of his property to one child it is lawful judicially, though he is sinful for so doing. And when a man has a profligate son he should give him no more than may suffice for his maintenance that he may not be aiding

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him in his wickedness. While if he has a son given to learning instead of business he may lawfully give more to him than to the rest."[1] The frequency with which *Hibas* are made in India makes it necessary that we should examine carefully the provisions of the law on this subject.

Hiba is a voluntary gift[2] of property or the substance of a thing by one person to another so as to constitute the donee, the proprietor of the subject matter of the gift. It requires for its validity three conditions: (1) a manifestation of the wish of the donor; (2) the acceptance of the donee, either impliedly or expressly; and (3) the taking possession of the subject matter of the gift by the donee, either actually or constructively.[3]

The Hanafi lawyers define *Hiba* as the conferring of a right of property in something specific without an exchange. Sidi Khalil (the Mâliki lawyer) defines it as an act of liberality by which the proprietor bestows a thing without the intention of receiving anything in exchange.[4] But the best definition of a *Hiba* is that given by the Shiah lawyers. They declare it to be an obligation *(akd)* by which the property in a specific object is transferred immediately and unconditionally without any exchange and free from any pious or religious purpose on the part of the donor.[5] A gift may be made verbally as by writing. The Transfer of Property Act leaves this provision of the Mahommedan law untouched.

Kamar-un-nissa Bibi v. *Hussaini Bibi.*

And the Privy Council in the case of *Kamar-un-nissa Bibi* v. *Hussaini Bibi*[6] upheld a verbal gift when it appeared to be supported by all the circumstances.

[1] Fatâwa-i-Alamgiri, IV, p. 545,

[2] That is, without consideration.

[3] *Nunda Singh* v. *Meer Jaffer Shah*, 1 Sel. Rep. 5.

[4] If an exchange is obtained, the character of the gift is changed.

[5] Mafâtih; Irshâd-ul-Azhân: Sharâya ul-Islam, p. 241.

[6] I. L. 3 All. 206.

There is another species of donation among the Mussulmans, charitable in its character and called *Sadkah*,[1] made in view of the future life. It takes its origin from the directions contained in the Koran, notably in Sura II, verse 211, "the goods that you give shall be known to God."

This species of gift is always irrevocable according to all the schools, but we shall deal with it in the order in which it occurs. Technically the donor or grantor is called *Wâhib*, the donee *Mouhoob-alaih* and the subject matter of the gift, *Mouhoob*.

Capacity to make a *Hiba*.

The qualities necessary for making a valid *Hiba*, in other words, the capacity for making a donation, or what might be called a voluntary settlement, are the same as those required for the validity of any other contract. Every act which in the Mahommedan Law would be treated under the head of *tussarufât-i-shariyeh* (legal transactions) presupposes a certain amount of free volition. "Consent," as has been well-remarked, "is an act of reason accompanied with deliberation, the mind weighing as in a balance the good and evil on both sides." Every legal act under the Mahomedan law is regarded as an *akd* or obligation, and the validity of every obligation depends on the faculty or capacity of the person doing the act to consider freely and rationally the consequences resulting therefrom. If the person is, by virtue of an inherent or superimposed and accidental disqualification, incapable of exercising his volition in a rational manner and with perfect reasoning, any obligation entered into by him is null and void.

The conditions therefore necessary for the validity of any disposition are the following :—

(1) Majority.

(2) Understanding.

[1] Properly votive offerings, see the Hedayah.

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(3) Freedom.

(4) Ownership of the subject matter of the disposition.

Minority.

Now these conditions are not restricted to gifts alone; they apply to all dispositions of property.

Persons under the age of puberty are deemed infants *(saghîr)*, and are treated as having no capacity to bind themselves for want of sufficient reason and discernment of understanding. Minority under the Mahommedan law ceases on the completion of the 15th year.[1] And, therefore, before the passing of Act IX of 1875, a Mahommedan who had attained the 15th year was qualified to make a valid disposition of his property. Since Act IX of 1875 has come into force, there are three ages of majority recognized by law. Section 3 of Act IX of 1875 saves the Mahommedan law of majority in questions relating to marriage, dower and divorce. "In respect of all other acts, the age of majority for persons who are wards of Courts, or for whom a guardian has been appointed by a Court of Justice is 21, for others it is 18." In the first case, a person would not be able to make a gift under the Mahommedan Law unless he has completed his 21st year, and in the latter case his 18th year. Owing to this peculiarity in the Majority Act, serious difficulties might arise concerning the capacity of one and the same individual in respect of different acts. For example, though a person, on the completion of his 15th year, may enter into a contract of marriage for any dower, would he have the power of commuting the dower by a *bye mukâsa?* Similarly would a woman over 15, but under the age of majority fixed by the Act, have the power of making a gift of her dower or remitting it to her husband?

[1] According to the general opinion, though as will be seen afterwards some jurists have held the completion of the 18th year as the age of majority.

Obligations entered into by idiots, lunatics and other persons *non compotes mentis* are null and void, provided, however, a person, who is afflicted by lunacy, has lucid intervals, any act committed during such interval would be valid, subject to certain restrictions.

Causes of Inhibition.

"The causes of inhibition," says the Hedâya, "are three, *viz.*, infancy, slavery and *junun* (insanity)."[1] Though the law books use the term *junun*, as the only cause of inhibition, it may safely be taken from the examples cited, that the classes of persons, around whom the law throws its safeguards, are not confined simply to the persons who are afflicted with lunacy, or insanity, in some form or other, but also to those who from accidental circumstances lose for the time being their power of understanding. Story has adopted the enumeration of Lord Coke of the different classes of persons who are deemed in law to be *non compotes mentis*, and this enumeration may be adopted as a safe guide to the principle upon which the Mahommedan Law proceeds in holding the acts of persons not *âkil* as invalid in law.

Non compotes mentis

"Lord Coke has enumerated four different classes of persons who are deemed in law to be *non compotes mentis*. The first is an idiot or fool natural; the second is he who was of good and sound memory, and by the visitation of God has lost it; the third is a lunatic, *lunaticus qui gaudet lucidis intervallis* and sometimes is of a good and sound memory and sometimes *non compos mentis*; and the fourth is a *non compos mentis* by his own act, as a drunkard. In respect to the last class of persons, although it is regularly true, that drunkenness doth not extenuate any act or offence committed by any person against the laws but it rather aggravates it, and he shall gain no privilege thereby, and although in strictness of

[1] Hed. III, (English translation,) p. 468.

LECTURE II. law the drunkard has less ground to avoid his own acts and contracts than any other *non compos mentis*, yet courts of equity will relieve against acts done and contracts made by him, while under this temporary insanity, where they are procured by the fraud or imposition of the other party. For whatever may be the demerit of the drunkard himself, the other party has not the slightest ground to claim the protection of courts of equity against his own grossly immoral and fraudulent conduct."

Drunkenness.

"But to set aside any act or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case, there can in no just sense be said to be a serious and deliberate consent on his part, and without this no contract or other act can or ought to be binding by the law of nature. If there be not that degree of excessive drunkenness, then courts of equity will not interfere at all, unless there has been some contrivance or management to draw the party into drink or some unfair advantage taken of his intoxication to obtain an unreasonable bargain or benefit from him. For in general, courts of equity as a matter of public policy, do not incline on the one hand to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication, and on the other hand they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law unless there is some fraudulent contrivance or some imposition practised." * * *

"In regard to drunkenness, the writers upon natural and public law adopt it, as a general principle, that contracts

made by persons in liquor, even though their drunkenness be voluntary, are utterly void, because they are incapable of any deliberate consent; in like manner, as persons who are insane or *non compotes mentis.* The rule is so laid down by Heineccius and Pufendorf. It is adopted by Pothier, one of the purest of jurists, as an axiom which requires no illustration. Heineccius in discussing the subject has made some sensible observations. Either, says he, the drunkenness of the party entering into a contract is excessive, or moderate. If moderate, and it did not quite so much obscure his understanding as that he was ignorant with whom or for what he had contracted, the contract ought to bind him. But if his drunkenness was excessive, that could not fail to be perceived, and therefore the party dealing with him must have been engaged in a manifest fraud, or that at least he ought to impute it to his own fault, that he had dealt with a person in such a situation. The Scottish law seems to have adopted this distinction, for by that law persons in a state of absolute drunkenness, and consequently deprived of reason, cannot bind themselves by any contract. But a lesser degree of drunkenness which only darkens reason has not the effect of annulling contracts."

Imbecility.

"Closely allied to the foregoing are cases where a person although not positively *non compos*, or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition or to resist importunity or undue influence. And it is quite immaterial from what cause such weakness arises, whether from temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions which result from sudden fear or constitutional despondency or overwhelming calamities. For it has been well remarked, that, although there is

LECTURE II. no direct proof that a man is *non compos* or delirious, yet if he is a man of weak understanding and is harassed and uneasy at the time, or if the deed is executed by him *in extremis*, or when he is a paralytic, it cannot be supposed that he had a mind adequate to the business which he was about, and he might be very easily imposed upon."[1] Mere imbecility or *safâhat* is no ground of inhibition.[2] The acts therefore of a person who, without being positively *non compos* or insane, is yet of a weak mind are valid, unless they are stamped with the indicia of fraud. In the consideration of cases falling under this head, it will be as well to bear in mind the words of Mr. Justice Story, as explaining the principles upon which the English Courts of Justice would avoid the acts of persons, who are suffering from such extreme weakness of mind as to be unable to guard themselves against imposition, or to resist importunity or undue influence.

Huriyet.

Huriyet or freedom is another necessary condition for the validity of a contract. A bondsman labours equally under the inhibition which applies to the acts of infants and *non compotes mentis*. But there is this difference between the case of a bondsman and those suffering from insanity, that whereas the act of a bondsman may be ratified by his master as the act of an infant may in some cases be ratified by his guardian, the acts of a lunatic are absolutely null and void.[3] The reason of the inhibition upon the acts of the bondsman is given at great length in the Hedâya.

[1] Story's Equity Jurisprudence, I, §§ 230—234.

[2] In the case of *Kamarunnissa Bibi* v. *Hussani Bibi*, I. L. R. 3 All. p. 206, the Judicial Committee of the Privy Council had to deal with a similar question, and they held on a review of all the circumstances that the donor was able to comprehend the transaction though apparently a person of weak intellect, and that the gift could not be impugned on that ground.

[3] Hedaya, III, p. 473.

Since slavery, however, does not exist in British India, even in the mild form in which it is recognised under the Mahommedan law, the question has little more than a mere antiquarian interest as throwing light upon a state of manners rapidly passing away, in the full light of modern civilisation and owing to a more correct reading of the laws of the Arabian Prophet.

The doctrine of *Ikrah* or compulsion.

The incapacity resulting from bondage is attached to the status of the bondsman, who stands, in the eye of the law, in the position of a minor, and is not treated as *sui juris*. But temporary loss of liberty, or rather freedom of volition by the exercise of constraint, duress or undue influence, as it does not affect the status, is not a ground of inhibition, and consequently contracts entered into under undue influence or coercion are valid, if ratified by the person contracting after the constraint or undue influence has ceased. In the Mahommedan law-books a special chapter under the head of *Ikrah* is devoted to the doctrines applicable to questions referred to in this place, but though some of the principles seem at first sight to fall much short of the rules recognized by the English Courts of Equity with reference to cases of undue influence, in general the principles are analogous. The doctrine, that in order to avoid a contract entered into by a free, sane and adult person, on the ground of *Ikrah* or compulsion, it must be shown that the "compeller" was in a position to carry out any threat held out by him, and that the threat itself was such as would influence the conduct of a reasonable person, only represents in another form the rule of equity, that the undue influence was such as would give rise to the presumption, that it might *bonâ fide* stop the exercise of free volition on the part of the

[1] Compare *De Montmorency* v. *Devereux*, 7 Cl. & Fin. 118. Compare the provisions of the Indian Contract Act (IX of 1872) §§ 14, 15 & 16.

person affected thereby. Any circumstance which so entirely overcomes the free agency of the party and exposes him to a fraudulent advantage or imposition would justify the Kazi to set aside the contract. "*Ikrâh* or compulsion," says the Hedâya,[1] "applies to a case where the compeller has it in his power to execute what he threatens whether he (the compeller) be the Sultan or any other person as a thief (for instance). The reason of this is that compulsion implies an act, which men exercise upon others, and in consequence of which the will of the other is set at nought at the same time that his power of action still remains. Now this characteristic does not exist unless the other (namely, the person compelled) be put in fear, and apprehend that if he do not perform what the compeller desires, the threatened evil will fall upon him, and this fear and apprehension cannot take place unless the compeller be possessed of power to carry his menace into execution; but provided this power does exist, it is of no importance whether it exist in the Sultan or in any other person. With respect to what is recorded from Abû Hanifa, that compulsion cannot proceed from any except the Sultan, the learned remark that this difference originates merely in the difference of times and not in any difference of argument, for in his time none possessed power except the Sultan, but afterwards changes took place with respect to the customs of mankind. It is to be observed that in the same manner as it is essential to the establishment of compulsion, that the compeller be able to carry his menace into execution, so likewise it is requisite that the person compelled be in fear that the thing threatened will actually take place, and this fear is not supposed, except it appear most probable to the person compelled, that the compeller will execute what he has

[1] Hedâya, III, p. 452.

threatened, so as to force and constrain him to the performance of the act which the compeller requires of him."

"A person forced into a contract may afterwards dissolve it. If a person exercise compulsion upon another by cutting, beating or imprisonment, with a view to make him sell his property, or purchase merchandise, or acknowledge a debt of one thousand dirhems to a particular person, or let his house to hire, and this other accordingly sell his property, purchase merchandise or so forth, he has it afterwards at his option either to adhere to the contract into which he has been so compelled, or to dissolve it and take back or restore the article purchased or sold, because one essential to the validity of any of these contracts is, that it have the consent of both parties, which is not the case here as the compulsion by blows or other means rather occasions a dissent and the contract is therefore invalid, unless the means of compulsion be trifling. (This rule, however, does not hold where the compulsion consists only of a single blow or of imprisonment for a single day, since fear is not usually excited by this degree of beating or confinement. Compulsion therefore is not established by a single blow or a single day's imprisonment, unless the compelled be a person of rank, to whom such a degree of beating or confinement would appear detrimental or disgraceful; for with respect to such a person compulsion is established by this degree of violence, as by it his volition is destroyed."

As in the English law, compulsion is not confined, therefore, to actual duress or restraint or even threats. It extends to all class of cases where the person has no free will, but stands *in vinculo juris* in consequence of extreme terror or apprehensions for himself or any other individual. Extreme necessity or distress, gross misapprehen-

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sion as to the nature of the relationship between the contracting parties, circumvention or the influence of one mind over another, all come within the doctrine of compulsion. The Mahommedan Law contains no specific rules relating to the obligations imposed on persons standing in a fiduciary relationship to the donor, but generally the doctrines recognised by the English courts of equity are applicable to such cases. The Bombay High Court has gone so far as to hold a gift invalid which contravened the principles recognized by English courts of equity with regard to persons standing in a fiduciary relationship to the donor, though the donor who was a Mahommedan lady, apparently possessed the capacity requisite under the Mahommedan Law to make a valid *hiba*. And the same principle was enunciated and enforced by the Judicial Committee of the Privy Council in the case of *Tacoordeen Tewary* v. *Nawab Syed Alli Hussain Khan*.[1]

Tacoordeen Tewary v. *Nawab Syed Alli Hussain Khan.*

Subject-matter of gift must be the property of the donor.

It is also a condition to the validity of a gift that the subject-matter should be the property of the donor, otherwise the gift is *ipso facto* void.

Insolvent donor.

Whether a person in insolvent circumstances, or extremely involved in debt, can make a voluntary settlement, is a question answered in two different ways by the Mâlikis and Hanafis, though in the result the two schools seem to coincide. The Mâlikis hold that a person so situated is under an " inhibition " regarding any dealing with his property.[2] According to the Hanafis there is no incapacity, but the Kazi may avoid the act at the instance of the creditors. This is in accordance with the doctrines of the English Law according to which voluntary settlements in fraud of creditors are held void.

The mere existence of debts is no ground for invalida-

[1] L. R. 2 Ind. App. 192.

[2] See Hedâya, III, Eng. Tr. p. 484.

ting a voluntary conveyance. To render such a conveyance void against creditors, either existing or subsequent, it is indispensable that it should transfer property which would be liable to be taken in execution for the payment of the debt.[1] Lecture II.

The principles applicable to such cases are fully elucidated in the cases noted in the margin.[2] A married

[1] Story, I, § 367; *Dundas* v. *Dutens*, 1 Ves. Jr., p. 196.

[2] *Ramtonoo Mookerjea* v. *Bibi Jeenut*, Fulton's Reports, p. 152; *Chunder Madhub Doss* v. *Ameer Ali* and others, 25 W. R. p. 119; In *Skarf* v. *Soulby*, 1 M. and G., the bill alleged "that at the time of executing a voluntary settlement, the settlor was in insolvent or in embarrassed circumstances, or indebted to divers persons," it was held that "in the absence of any proof of actual insolvency, the mere fact of the settlor then owing some debts was not sufficient to invalidate the settlement." The judgment in *Bibi Jeenut's* case is too important not to be given *in extenso* :—

Peel, C. J. :—"The passage cited from Macnaughten, p. 222, for the lessor of the plaintiff is not applicable, as that relates to a gift of money for money, and there possession is necessary. In this case, the lessor of the plaintiff claims under Jumeat Khan, and as such, is estopped by the recitals in this deed of gift, which is of a prior date. This is not a case in which the assignee is disputing the validity of the deed for the benefit of creditors. There is no doubt the deed is genuine, and as to the time of execution, no evidence having been given to the contrary, we must presume that it was executed at the time it purports to be dated. The deed has been proved in the usual manner by calling one of the attesting witnesses, and it was not necessary to go further. The Kazee, however, before whose predecessor it was registered, in confirmation of this presumption, states that, in his opinion and from the practice of his office, the seal of the Kazee, who registered the deed, was affixed about the time at which it is alleged to have been affixed. This, however, is merely in confirmation and strengthens the presumption. This deed then being of a prior date, the subsequent purchaser must impeach it for fraud; all those grounds on which a deed is generally impeached are, however, wanting in this case. There is no evidence before us that the donor was in debt at the time of making this gift, nor is there any evidence to show that he executed it in contemplation of insolvency or with a view to defraud creditors. This, moreover, is not the case of a simple and voluntary gift, but of a gift for a consideration. The lessor of the plaintiff is in no better position than the donor. The prior conveyance [illegible] and recital of possession rendered are evidence against the donor, and so against the

LECTURE II. woman is not debarred by the status of marriage from making any disposition during the subsistence of marriage, as if she were a *femme sole*.

Marz-ul-Maut.

Gifts by persons suffering from a mortal sickness are treated differently by the several schools. According to the Mâlikis such gifts are invalid. According to the *Jâma-ush-Shattát*, which is a work of great authority among the Shiahs, a gift made by a person suffering from a mortal illness which ends fatally, is valid with reference to the entire disposition, provided delivery takes place before the death of the donor, and provided the donor is in the perfect possession of his senses.

The principle is stated thus[1]:—

"A man makes a gift in death-illness (*Marz-ul-Maut*) of all his property to another whilst in possession of his

lessor of the plaintiff who comes in under him. The evidence thus clearly shows that possession was given, but none of the authorities even in cases of gift show that possession must be continuous, indeed it would be absurd to suppose the necessity of the husband's never occupying those premises which he has given to his wife. Now, though the validity of a gift depends upon the seisin, the validity of a sale is derived not from the seisin but from the contract, and the passage cited from Macnaughten, p. 221, clearly shows that this deed must be construed according to the rules affecting the laws of sale. Under this gift, the wife may have a good title when the other donees would not from failure of consideration. As the defendant has taken defence to the whole of the premises, and has only proved the title to a portion, the verdict must be for the lessor of the plaintiff, but execution will be limited to that portion of the premises not given to the wife in this deed of gift. We will, however, reserve liberty to Mr. Leith to move to enter a verdict for the lessor of the plaintiff for the whole, should he upon consideration think that by the principles of Mahommedan Law he is entitled to such a verdict."

[1] سوال

چه میفرمایند در این مسئله که هرگاه شخصی در مرض الموت هبه و بخشش نماید کل مال خود را بشخصی در حال صحت عقل ایا این هبه معتبر و صحیح است از اصل مال یا از ثلث و ایا درلزوم این موهبه شرط است تصرف متهب در مال یانه برفرض اشتراط ایا

senses; is this gift valid with reference to the whole property or only to one-third? Is possession of the donee necessary for the validity of this gift? Is possession of only a portion valid with reference to the whole? If the donee takes possession of the subject-matter of the gift, locks it up in a case and leaves it with the donor, or in the case of a gift of a house, if the donor being sick lives in it, whilst the donee is in possession thereof, is his possession sufficient in law? These involved questions are answered in this way:—"yes, the gift is valid with reference to the entire property and is not restricted to a third;"

تصرف دربعض در حکم تصرف در کل است یا نه وهرگاه واهب
موهوب را بتصرف متهب بدهد و متهب او را دراطاق واهب در دولابه
گذاشته و کلیدان دولابه را خود متهب بردارد ایا این را تصرف معتبر
در شرع میگویند یا نه و هرگاه واهب یورتی را بمتهب هبه نموده باشد
ورفع موانع از تصرف متهب نموده باین معنی که متهب دران یورت
امد و شد کند و واهب مانع او نشود ولیکن واهب بجهة نا خوشي
و بیماري دران یورت خوابیده باشد ایا این را تصرف متهب میگیرند
یا نه *

جواب

بلی هبه صحیح است و اظهر این است که در تمام مال صحیح
است و منحصر در ثلث نیست و تصرف و قبض در مطلق هبه شرط است
و بدون ان لزومي ندارد و اگرقبل از اقباض بمیرد هبه باطل میشود
مگر انکه متهب صغیر باشد و واهب ولی باشد که قبض ولی قبض
صغیر است و ضرور بقبض علیحده نیست و قبض بعض در لزوم کل
کافي نیست و درمنقولات همان اخذ باید بخصوص باین نحو که در
جای مضبوط کند کافیست هرچند در خانهٔ واهب باشد وهم چنین
در اقباض یورت تخلیه باو رفع مانع ازتصرفات کافیست هرگاه بقصد
اقباض بوده وخوابیدن خود را درانجا مانع از تخلیه نمیدانست وظاهر
اینست که هر گاه بگوید خانه ازتو وتصرف کن و بیا و برو لیکن من
هم چند روزے در اینجا هستم چون بیمارم یا انکه درعرف وعادت
مضایقه از بودن ان دران مکان نمیشده و میگفته اند که بتصرف او
داده کافیست و شاید که این ازباب اقباض صندوق باشد با وجود انکه
مطاع واهب دران باشد *

LECTURE II.

"Possession of the whole is necessary; without possession, it is not valid;"

"If the donor dies before possession, the gift is void; unless the donee is an infant and the donor is his guardian, for the possession of the guardian is tantamount to the possession of the minor and separate possession is not necessary. Possession of a portion is not effectual with reference to the whole;"

"If possession is actually taken of a moveable thing it is sufficient, though it may be left in the house of the donor. As regards a house, if it is sufficiently clear possession has been taken by the donee, the mere fact of the donor dwelling in it according to custom or owing to illness will not affect the validity of the gift.[1]" In the Sharâya, however, the principle is laid down differently, "when a person," says the Sharâya, "has made a gift being dangerously ill at the time, but afterwards recovers, the gift is valid. If, however, he should die of the disease, and the heirs refuse their assent to the gift, it is valid only to the extent of a third of his estate, according to the best traditional authority." This divergence of views is hardly reconcilable, unless it be supposed that the question in the *Jáma-ush-Shattát* did not refer to the non-assent of the heirs, though upon the face of it there is no reason for supposing so. According to the Sharâya, the Shiah principle is exactly the same as under the Hanafi law. Whilst the *Jáma-ush-Shattát* would only see whether at the time of the disposition, the donor was possessed of his senses, the Sharâya would only note his death. Considering the course of decisions on the question, in which it has been held in the case of both Sunnis and Shiahs, that a death-bed gift, unless assented to by the heirs, is valid only with reference to one-third of the donor's

[1] Jâma-ush-Shattât, chapter on *Hiba*.

estate, probably there will be some difficulty in inducing the Indian Courts to accept the principle laid down in the *Jáma-ush-Shattát* as authoritative law. The question will require a thorough judicial analysis and discussion before it can be definitively settled. LECTURE II.

According to the Sharâya, then, if the donor should die after the contract and before possession has been taken of the gift, it falls back into his inheritance.[1]

Both these considerations are simple and easy of proof. Under the Hanafi law, gifts made *in extremis*, or at a time when the settlor or donor is suffering from a death-illness are valid with reference to one-third of his estate. The term "death-illness" or *Marz-ul-Maut* is explained thus in the *Fatâwa-i-Alamgiri* :—

"When a sick woman has given her dower to her husband, the gift is valid if she recovers from her illness, and even though she should die of that illness, yet if it were not a death-illness, the answer would be the same; but if it were a death-illness, the gift would not be valid without the sanction of the heirs. As to the definition of a death-illness, it has been said, and this is approved for the *Fatwa*, that when the illness is such that it is highly probable that death will be the result, it is a death-illness whether she has taken to her bed or not. Abû Lais has said that it is a death-illness when a man cannot pray standing; *and we adopt this.* A sick woman having given her dower to her husband then died, whereupon Abû Jâfar said, that if at the time of the gift she were able to stand up for necessary occasions, and raise herself without assistance, she should be considered as one in health and the gift is valid. The most valid definition of death-illness is, that it is one which it is highly probable will issue fatally, whether in the case of a man it disables him from getting

[1] Sharâya, p. 243.

LECTURE II. up for necessary avocations out of his house or not, such, as for instance, when he is a *fakeeh* or lawyer from going to the *musjid* or place of worship, and when he is a merchant from going to his shop, and whether in the case of a woman it does or does not disable her from necessary avocations within doors. The lame, the paralytic, the consumptive, and a person having a withered or palsied hand, when the malady is of long continuance, and there is no immediate apprehension of death, may make gifts of the whole of their property. But when a woman has been seized with the pains of labour, her acts in that state are valid only to a third of her property, unless she recovers when they become lawful to the full amount. If she should give her dower to her husband, while in labour and should die during the *nifas* (or prescribed, period for purification after child-birth,) the gift would not be valid."

The *Radd-ul-Muhtâr*, however, states the rule in the following way: "For *Marz-ul-Maut* there is a period of one year, and gifts, *wakfs* and (other) obligations (entered into then) are equivalent to bequests and will operate with reference to one-third, if possession was taken before the donor's death. If the donor die before giving over possession to the donee, then the bequest is null, for the gift of the *mariz* is a bequest, as Kazi Khan and others have explained this fully."[1]

[1] At another place occurs the following passage :—

و يبطل هبة مقعد و مفلوج و اشل و مسلول ـ به علة السل و هو
قرح فى الرئة ـ من كل حالة ان طالت مدته سنة ـ و لم يخف
موته منه و الا تطل و خيف موته ـ فمن ثلثة ـ لانها امراض مزمنة
لا قاتلة قبل مرض الموت ان لا يخرج لحوائج نفسه و عليه اعتمد
فى التجريد ـ بزازيه ـ و المختار انه ما كان الغالب منه الموت و ان لم
يكن صاحب فراش قهستاني عن هبة الذخيرة (قوله و هبة مقعد
الخ) المقعد بضم ففتح من لا يقدر على القيام و المفلوج من ذهب

"Similarly a sale (made in *Marz-ul-Maut*) takes effect with reference to a third. The gift of the sick has two aspects, one with regard to its operation as a bequest, and the other with regard to the delivery of possession as a gift. In bequest, the right of property vests after death; but in gift the property vests immediately." LECTURE II. *Marz-ul-Maut.*

نصفه و بطل عن الحس و الحركة و الاشل من شلت يده - عناية - (قوله به علة السل) هو اولى مما فى النهاية عن المغرب من ان المسلول من سلت خصيتاه لما قال الاتقاني انه لا يناسب هذا لانه بعد تطاول الزمان لايسمى مريضا اصلا (قوله ان طالت مدته سنة) هذا على ما قاله اصحابنا و بعضهم قالوا ان عد فى العرف تطاولا فتطاول و الا فلا قهستاني (قوله ولم يخف موته منه) هذه الجملة وقعت موضحة للجملة الشرطية حموي عن المفتاح ثم المراد من الخوف الغالب منه لانفس الخوف كفاية و فسر القهستاني عدم الخوف بان لا يزداه ما به وقتا فوقتا لانه اذا تقادم العهد صار طبعا من طباعة كالعمي و العرج و هذا لان المانع من التصرف مرض الموت و هو ما يكون سببا للموت غالبا و انما يكون كذالك اذا كان بحيث يزداد حالا فحالا الى ان يكون آخره الموت و اما اذا استحكم و صار بحيث لا يزداد و لا يخاف منه الموت لا يكون سببا للموت كالعمي و نحوه اذ لا يخاف منه و لهذا لا يشتغل بالتداوي زيلعي و غير (قوله و الا تطل و خيف موته) عبارة القهستاني و الا يكن واحد منهما بان لم تطل مدته بان مات قبل سنة او خيف موته بان يزداد ما به يوما فيوما - و مفهومه انه اذا لم تطل و لم يخف موته فهو من الثلث و يخالفه عبارة لز يعي و نصها اي ان لم يتطاول يعتبر تصرفه من الثلث اذا كان صاحب فراش و مات منه في ايامه لانه في ابتدائه يخاف منه الموت و لهذا يتداوي فيكون مرض الموت و ان صار صاحب فراش بعد التطاول فهو كمرض حادث حتى تعتبر تصرفاته من الثلث و هو الموافق لكلام الشارح و يبقي ما اذا طال و خيف موته و مقتضي عبارة القهستاني انه من الثلث ايضا و هو المفهوم من تقييد المصنف ما يكون من كل المال بقوله و لم يخف موته (قوله لانها امراض مزمنة) اي طويلة الزمان و هو تعليل لقوله من كل ما له فكان ينبغي ذكره قبل قوله و الا الخ قال فى المنح و فى الفصول العمادية و اما المقعد و المفلوج قال فى الكتاب ان لم يكن قديما فهو بمنزلة المريض و ان كان قديما فهو بمنزلة

LECTURE II.

"When a sick person makes a gift," says the *Fatâwa-i-Alamgiri*, "it does not operate beyond one-third, anything beyond a third must be returned by the donee. And this applies to the vendor in a sale."

It has been held that a deed of gift executed at a time when the grantor was about dying cannot operate save as a will, and if made in favour of one who is an heir, it is inoperative without the consent of the other heirs.[1]

Under the Hanafi law, the term *Marz-ul-Maut* is applicable not only to diseases which actually cause death, but to diseases from which it is probable that death will ensue, so as to engender in the person affected with the disease an apprehension of death.

But it has been held by the Allahabad High Court, that where the malady is of long continuance, and there is no immediate apprehension of death, a sick person may make a gift of his entire property.[2] A malady of long continuance is an illness which has lasted for a year, and there is no immediate apprehension of death.[3]

الصحيح لان هذه علة مزمنة و ليست بقاتلة (قوله و عليه اعتمد فى التجريد) وفى المعراج و سئل صاحب المنظومة عن حد مرض الموت فقال كثرت فيه اقوال المشائخ و اعتماد نا على ذالک على قول الفضلي و هو ان لا يقدر ان يذهب في حوائج نفسه خارج الدار و المرأة لحاجتها داخل الدار لصعود السطح و نحوه و هذا الذي جرى عليه في باب طلاق المريض و صححه الزيلعي اقول الظاهر انه مقيد بغير الامراض المزمنة التي طالت و لم يخف منها الموت كالفالج و نحوه و ان صيرورقه اذا فرش و صنعته عن الذهاب في حوائجه فلا يخاف ما جرى عليه اصحاب المتون و الشروح هنا تامل (قوله و المختار آلخ) كذا اختاره صاحب الهداية في كتابه التجنيس *

Radd-ul-Muhtâr, V, p. 628.

[1] Sutherland's Weekly Reporter (B), p. 17.

[2] This seems to be in accordance with the principle stated in the *Jâma-ush-Shattât*, which looks to the effect of the illness from which a man is suffering, upon his mind.

[3] *Muhammad Gulshare Khan* v. *Mariam Begum*, I. L. R. 3 All. 731. *Labbi Bibee* v. *Bibbun Bibee*, 6 N. W. P. H. C. Repts., 1874, p. 159.

Labbi Bibee v. Bibbun Bibee.

In the case of *Labbi Bibee* v. *Bibbun Bibee*, the Allahabad High Court held that, according to Mahommedan law, a gift by a sick person is not invalid, if at the time of such gift his sickness is of long continuance, *i. e.*, has lasted for a year, and he is in full possession of his senses, and there is no immediate apprehension of his death. The result of this decision, is that a gift is not invalid, where, at the time of the gift the donor had suffered from a certain illness for more than a year, and was in full possession of his senses, and there was no immediate apprehension of his death, though he died shortly after making the gift, but whether from such sickness or from some other cause it was not possible to say.

Ghulam Mustafa v. Hurmut.

In the case of *Ghulam Mustafa* v. *Hurmut*,[1] the same Court held that the provisions of the Mahommedan law applicable to gifts, made by persons labouring under a fatal disease, do not apply to a so-called gift, made in lieu of a dower-debt, which is really of the nature of a sale.

It follows therefore that a person labouring under such a disease cannot make a valid gift of the whole of his property, until a year has elapsed from the time he was first attacked by it.

When a gift is made by a person labouring under such a disease, it is good to the extent of one-third of his estate, if the donee has been put into possession by the donor. According to the *Sharáya* the Shiah law is the same, but the *Jáma-ush-Shattát*, as we have seen, states the principle somewhat differently.[2]

As regards the capacity of a mandatory *(vakil)* to make a valid *hiba* on behalf of his principal, his powers are

[1] I. L. R. 2 All. p. 854 *per* Pearson and Oldfield, JJ.

[2] *Musst. Labbi Bibee* v. *Musst. Bibbun Bibee*, 6 N. W. P. High Court Reports, p. 159.

LECTURE II. counterminous with those of the latter. A husband is not generally speaking the mandatory of his wife.

SECTION III.

The Mouhoob-lahû or donee.

The *Mouhoob-lahû* or donee.

Any person may receive a gift, without distinction of sex, or age, or creed, provided he or she is in existence at the time of the gift. A gift therefore to an unborn person, one not *in esse*, either actually or presumably, is invalid. A gift, however, to a child *en ventre sa mere* is valid, if the child is born within six months from the date of the gift, because in that case it is presumed that the child was actually existing as a distinct entity in the womb of its mother. If a gift is made to A. for life with remainder to a person not existing,—under the Hanafi law, the gift to A. would take effect as an absolute gift,[1] but under the Shiah law, A. would take a life-estate and upon A.'s death, the property would revert to the donor or his heirs.[2] A gift, however, to A. and his children or descendants generally, or to his descendants "line after line," or any gift coupled with such terms as necessarily imply that the property is bestowed without any limitation, would take effect as an absolute gift to A.

The Mouhoob :—The subject-matter of the gift.

The *Mouhoob*.

Anything over which dominion or the right of property may be exercised, or anything which may be reduced into possession either *in præsenti* or *in futuro*, or anything, in fact, which comes within the meaning of the word *mâl*, may form the subject of gift; *choses in action* and incorporeal rights may form the subject of gift equal-

[1] Baillie's Dig., p. 517.

[2] If he (the donor) should say I have given this mansion to thee for life and to thy successor, it would be only *Umra* or for his own life, Sharâya, p. 241; 1 Querry, Droit Musulman, p. 594.

ly with corporeal property. "A debt," says the *Kifâyah*, "considered with reference to the prospect of payment is *mâl* or corporeal property, (so much so that *zakât* is obligatory on it); and is susceptible of *tamlîk*. Considered with reference to its present state, it is a *wasf* or a *quality, i. e.*, indebtedness, and is susceptible of *Iskât* or extinction. Hence, a gift of it to the debtor which is an extinction is valid both by analogy and on a liberal interpretation (of the law), but a gift of it to another which is *tamlik* (transfer of property) is valid on the latter ground."[1] The argument therefore which was endeavoured to be raised in the case of *Mullick Abdul Guffoor* v. *Musst. Maleka*[2] has no foundation whatsoever. On the contrary, the Hanafi law, as given in the *Kifâyah*, expressly recognizes the legality of gifts of incorporeal rights and

Mullick Abdul Guffoor v. *Musst. Maleka.*

[1] *Kifâyah* (published with the *Hedâya*), Cal. Ed., vol. III, p. 698.

Under the Transfer of Property Act, actionable claims are transferable, but under s. 135, the debtor is entitled to a discharge upon paying the transferee the price actually paid by him with incidental expenses and interest. This provision does not apply to gifts, but whether it would apply to a *hiba-bil-ewaz* is a question not unattended with difficulty. A *hiba-bil-ewaz*, where not in reality a *hiba simple*, is, in its legal incidents, equivalent to a sale, and yet is subject in most of its aspects to the rules governing *hiba simple*. Would section 135, then apply to the case of a *hiba-bil-ewaz*, where some consideration is proved, bearing in mind the provisions of section 129?

In Case I, Macnaughten's Mahommedan Law, Precedents of Wills, it is declared, that "the term *tamlik* is one of general import, and may be applied to a gift, whether unconditional or conditional, to a sale or to a will. But the term *hiba* (gift) signifies the immediate transfer of property to another without consideration. Thus the difference between an assignment of proprietary right and gift is, that the one is general and the other particular."

Again, there is this passage in the *Ashbâh-un-Nazâir*:—"The circumstances which constitute *tamlik* are interchange of property; dower, compensation by a wife to her husband for divorce from him, inheritance, gift, charity, bequest, endowment or appropriation, plunder, or conquest over lawful things and animals, finding of waifs, and amends to a person killed and subsequently inherited by his heir are all *tamlik*."

[2] I. L. R. 10 Cal. 1112.

LECTURE II. *choses in action.* And custom *(urf)*, to which Mahommedan lawyers have always attached considerable force in deciding questions on the ground of *Istehsân* ("favourable construction" or "liberal interpretation,") to make the law harmonize with social progress, has accepted the rule and carried it into practice in different directions. Hence the gift of Government securities, which only carry with them the right of drawing interest on them,[1] the grant of *malikana* rights, which confers on the donee the right of obtaining from Government the proprietor's share in the income of an estate, and the like, form frequent subjects of gift. Similarly under the Mohammedan sovereigns, assignments of revenue, which were called *Suyûrghul* grants, were often transferred by the grantees.

Gift of property in the occupation of tenants.

A gift of property in the occupation of tenants is lawful,[2] for this implies the grant of the right to receive the rents from the occupying tenants or lessees. But when property is held by another under a lease or *ijara*, it cannot be given so as to convey the actual possessory right to the donee, or to enable him to obtain *khas* possession of the subject-matter of the gift, as it will be inconsistent with, and in contravention of, the contract with the donor and his lessee. This, in fact, is the meaning of the passage in the *Fatáwa-i Alamgiri*,[3] "but if it be in the hands of an usurper or of a pledgee, or of a *mustâjir* (hirer or lessee,)[4] the gift is not lawful for want of possession."

[1] *Nawab Amjad Ally Khan* v. *Mohamdi Begum*, 11 M. I. A., p. 517; *Dorab Ally Khan* v. *Suliman Kadr*, I. L. R. 8 Cal. p. 1.

[2] *Majma-ul-Anhar.*

[3] Alamgiri, III, p. 521.

[4] The term "ijara" or lease, from which *mustâjir* is derived, under the Mahommedan Law, is not restricted to a lease of lands or immoveable property. It comprehends various classes of contracts which come under the head of Bailment, with the exception of pledge and deposits, which are

There is no hypothecation under the Hanafi law without seisin.[1] Consequently, when property is in the hands of a mortgagee or a bailee, the interest of the mortgagor or bailor, *viz.*, the reversionary right, can only be conveyed by gift to the donee, and not the actual possessory right, which by the fact of bailment or mortgage has been transferred to the mortgagee in possession, or the bailee; so where immoveable property is in the occupation of a lessee or a tenant, the right of receipt of rents alone can be granted by the donor. The Bombay High Court, in the case of *Mohinudin* v. *Manchershah*,[2] has decided that lands in the possession of a mortgagee cannot form the subject of *hiba* under the Mahommedan law. It is submitted, however, that this view is founded upon a strained

LECTURE II.

Hypothecation.

Mohinudin v. *Manchershah.*

treated separately under the head of *Rahn* and *Wadiat* respectively. The term *mustâjir* does not occur in the *Hedâya*.

The passage in the Hedâya (Arabic) runs thus—

ما اذا كان في يده او في يد مودعه لان يده كيده بخلاف ما اذا
كان مرهونا او مغصوبا او مبيعا بيعا فاسدا لانه في يد غيره او في ملك
غيره و الصدقة في هذا مثل الهبة *

The gloss of the Kifâyah on the above is the following :—

بخلاف ما اذا كان مرهونا او مغصوبا الى اخره يعني اذا كان مال
الاب مغصوبا او كذا و كذا لم يتم الهبة بالعقد لانه فى يد غيره فى
الرهن و الغصب او في ملك غيره فى البيع الفاسد فان قيل ينبغي
ان لا يتم الهبة اذا كان في يد مودعه لاشتراط الكمال فى القبض و كون
هذا القبض حكميا و هو نقص من القبض حقيقة قلنا القبض حكما
كاف لا تمام الهبة *

In the *Majma-ul-Anhar* (commentary on the *Multeka-ul-Abhar* of Shaikh Ibrahim al-Halabi, by Abdur Rahaman styled Shaik Zadah,) the words *Murtahin* and *Mustâjir* do not occur with reference to the subject mentioned in the *Fatâwa-i-Alamgiri*, the restriction apparently being confined to properties in the hands of a *Ghâsib* (usurper) and properties transferred under an invalid sale *(bai-i-fasid)* ; *Majma-ul-Anhar* (Constantinople Ed.) p. 343, Chapter on Gifts.

[1] Hedâya, III, p. 189.

[2] I. L. R. 6 Bom. p. 650.

and erroneous apprehension of the Hanafi law, under which seisin is requisite for hypothecation. Under the Mâliki law seisin is not necessary. But, according to the correct view of the Hanafi doctrine on the subject, there is nothing in it to preclude the mortgagor from granting his equity of redemption to another. On the contrary, under the law relating to *hawâlat*,[1] the debtor may transfer his liability to another. And as the property forms the security for the debt, the transferee obtains the right to redeem the property subject to the payment of the debt. But, when the property is not in the hands of the mortgagor, as is usually the custom in this country, when it is only burdened with certain debts, which are secured upon it, the mortgagor is perfectly entitled to make a disposition thereof. In the case of *Shahzadee Hazra Begum* v. *Khaja Hussain Ali Khan*,[2] it was held by Peacock, C. J. and Jackson and Macpherson, JJ., that the existence of a mortgage at the time at which an endowment is made does not render the endowment invalid under the Mahommedan Law. Delivery of possession is equally necessary in *wakf* as in *hiba*, and therefore the principle enunciated by the learned Judges in the above-mentioned case is applicable to both.

Shahzadee Hazra Begum v. Khaja Hussain Ali Khan.

The gift of a property in the hands of a usurper, probably stands on a different footing, the right of the donor to such property is a mere inchoate gift, *viz.*, to sue for recovery of possession. A gift of such a right probably would not be valid. It has been held, however, that the sale of property of which the vendor is out of possession is valid[3]. Consequently, whether a gift of such property is valid or not under the Mahommedan Law, a *hiba-bil*

[1] Hedâya, II, p. 606.

[2] 12 W. R. p. 498.

[3] *Mohinudin* v. *Manchershah*, I. L. R. 6 Bom. p. 650.

ewaz thereof, which is equivalent to a sale in its legal incidents, would be valid. LECTURE II.

Regarding the validity of a gift of lands and tenements in the occupation of tenants, the judgment in the case of *Mullick Abdul Guffoor* v. *Musst. Maleka* has settled the question beyond any room for doubt. The Chief Justice dealing with the arguments urged against the validity of the gift said,[1]—

"The question, therefore, in this Court, so far as this deed is concerned, has been, whether having regard to the subject-matter of the gift, and the fact of there having been no actual partition made of it at the time when the deed was executed, as between the two donees, the transaction is valid in law as against the plaintiffs."

"This question has been argued before us at some length, and we are much indebted to the learned Counsel on both sides for the pains which they have taken to refer us to all the authorities upon the subject. But having heard the matter fully argued, we are satisfied that the gift is valid, and that the conclusion at which the lower Court arrived is just."

"The property, which is the subject of the gift, consists of several zemindaries, and shares in zemindaries, let out to tenants and ryots, as such estates usually are; a good many lakheraj properties also let out to tenants; several *malikana* rights of some value, and a variety of house property in Patna, and elsewhere, consisting of houses, sheds, roads, gardens, &c."

"There is no satisfactory evidence as to how this latter property was occupied or utilized at the time when the gift was made."

"The arguments on the part of the plaintiff resolve themselves into three main points:"

[1] I. L. R. 10 Cal. 1112.

"1*st*, That by Mahommedan law, a gift cannot be made of lands which are not in the possession of the donor, nor of incorporeal properties, such as rents, *malikana* rights and the like; 2*nd*, that an undivided share of a house or a zemindari cannot be made the subject of a gift; and 3*rd*, that a gift to two persons without previous division and separation is invalid."

"In dealing with these points, we must not forget that the Mahommedan law, to which our attention has been directed in works of very ancient authority, was promulgated many centuries ago in Bagdad, and other Mahommedan countries, under a very different state of laws and society from that which now prevails in India; and that, although, we do our best here in suits between Mahommedans to follow the rules of Mahommedan law, it is often difficult to discover what those rules really were, and still more difficult to reconcile the differences which so constantly arose between the great expounders of the Mahommedan law ordinarily current in India, namely, Abû Hanifa and his two disciples."

"We must endeavour, so far as we can, to ascertain the true principles upon which that law was founded, and to administer it with a due regard to the rules of equity, and good conscience, as well as to the laws, and the state of society and circumstances which now prevail in this country."

"Having premised thus far, we think that the first of the above points, although it has occupied some time in argument, may be very readily disposed of. In fact it appears to us to have been already settled."

"We have been referred to several authorities, and, amongst others, to the *Durrul Mukhtar, Book on Gifts*, p. 635, which lays down that no gift can be valid unless the subject of it is in the possession of the donor at the time

when the gift is made. Thus, when land is in the possession of a *usurper (or wrong-doer), or of a lessee or mortgagee, it cannot be given away;* because in these cases the donor has not possession of the thing which he purports to give." Lecture II.

"But we think that this rule, which is undoubtedly laid down in several works of more or less authority, must, so far as it relates to land, have relation to cases where the donor professes to give away *the possessory interest* in the land itself, and not merely a reversionary right in it; of course an actual seisin or possession cannot be transferred, except by him who has it for the time being."

"It is possible, too, that these texts may be explained by what we are informed was the law in Bagdad in early times with reference to land let on lease; we are told that an *ijara* lease, which in this country means generally a farming lease of ryoti holdings, meant, according to the law of Bagdad, a lease of the land itself or its usufruct; and that the owner of land having made such a lease, could not by law transfer his reversionary interest, so as to give the transferee a right to receive the rent from the *ijaradar*. (See *Fatâwa-i-Alamgiri*, Vol. III, *Book on Gifts*, p. 521.)

"Whether this is the real meaning of the authorities may be doubtful; but it is certain, that such a state of the law in this country would render the transfer by gift of a zemindari and other landlord's interest simply impossible: lands here are almost always let out on leases of some kind, and there are often four or five different grades of tenants between the zemindar and the occupying ryot. What is usually called *possession* in this country, is *not actual or khas possession*, but the receipt of the rents and profits; and, if lands let on lease could not be made the subject of a gift, many thousands of gifts, which have been made over and over again of ze-

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"In that case a gift of large zemindaries was held to be valid, although it is clear that they consisted, as such estates generally do, of tenures and interests of all kinds; no objection was then taken to the gift upon the ground that has been urged before us here, and indeed, so far as it appears, that point has now been taken for the first time."

"Similarly, as regards the *malikana* rights, we are not aware of any reason, why rights of this description should not be made the subject of a gift, in the same way as rents or other incorporeal property of that nature. We have already decided that reversionary interests, carrying with them the right to receive rents, may be thus transferred; and other *choses in action*, which give the parties entitled to them the right to receive money from the Government or third persons, may be made the subject of a gift."

"A *malikana* right, is the right to receive from the Government a sum of money, which represents the *malik's*

[1] 23 W. R. 208.

share of the profits of a revenue-paying estate, when from his declining to pay the revenue assessed by the Government, or from any other cause, his estate is taken into *khas* possession of Government, or transferred to some other person, who is willing to pay the rate assessed. There is nothing in principle, so far as we can see, to distinguish a *malikana* right from a right to receive rents, or the dividends payable upon Government paper." LECTURE II.

His Lordship then proceeded to deal with the argument urged on behalf of the appellant that the gift was bad on the ground of *mushaá*. "It is urged: (1) that a gift of an undivided share in any property is invalid because of *mushaá*, or confusion, on the part of the *donor;* and (2) that a gift of property to two donees without first separating and dividing their share is bad, because of confusion on the part of the *donees*."

"But it must be borne in mind that this rule applies only to those subjects of gift, which are capable of partition. See the Hedâya, Vol. III, *Book on Gift*, p. 293, where the rule laid down is to the effect that—"A gift is not valid of *what admits of division* unless separated and divided." See also *Baillie's Mahommedan Law*, 2nd Ed. p. 520; *Fatáwa-i-Alamgiri, Book on Gift*, p. 521; *Macnaghten's Mahommedan Law*, p. 201."

"The rule, therefore, applies only to gifts of such property as is capable of division; whereas, reversionary interests, or *malikana*, or other *choses in action*, are not capable of division."

"It is said that one main reason for this rule, which applies only to gifts, and not to sales, is to protect a man's heirs against gifts made in defeasance of their rights. We were referred to certain texts which apparently favoured that view; and it is also probable that another reason for the rule was to protect creditors against frau-

LECTURE II. dulent gifts made by debtors, it being a well-known test of the *bona fides* of a gift, whether possession of the thing given has passed to the donee."

"It has been urged upon us, very strongly, that according to this rule of *mushaâ,* the gift, which was made to the defendants in this case, is wholly void, because, the gift being of lands, no partition of such lands was made; and even supposing the gift to be valid, as regards the zemindari properties which were let out on lease, it would still be invalid as regards the house-property, gardens, sheds, &c. which are not shown to have been let out on lease, and which were capable therefore of actual partition."

"We think, however, that this objection is not well-founded, as regards any part of the property in question."

"As regards the zemindaries, the estate of the donor, as we have seen, was an interest in reversion, and the property which was transferred by the gift of these zemindaries was merely that sort of estate which entitled the donees to receive the rents and profits. We find from the evidence of the defendants, (which was so clear upon this point that the Judge in the Court below desired to hear no more than that of two of the witnesses), that during Kaniz Fatima's lifetime, she and Muleka were in separate collection of the rents, and that immediately upon the gift being made the possession was transferred, in the only way in which it could be transferred, to the two donees."

Gift of a debt under the Shiah Law.

The Shiah *Sharâya-ul-Islam* states, that the donation of a debt, or what rests on the obligation of another, is not valid to any other than the debtor or the person by whom it is due, according to the most approved doctrine, by reason of the condition already mentioned that it requires possession to complete it, whereas if made to the debtor

himself, it is quite valid and operates as a release of the debt.[1] It will be seen from the above passage itself, that there is a considerable body of opinion which is opposed to the view that the gift of a debt can only be made in favour of the debtor. On the contrary, many eminent Shiah jurists agree with the Hanafi lawyers, in holding that, according to a liberal interpretation, the transfer or assignment of a debt to a third person by the creditor is lawful. This view has been so generally approved of by *urf* or custom, which is the embodiment in practice of the general consensus of a progressive community, that the most approved doctrine mentioned by the author of the *Sharâya* may be regarded as entirely exploded, if not erroneous.[2]

Hanafi Law.

Under the Hanafi law the release of a debt to the debtor is valid without his consent, but becomes inoperative, if the debtor refuses to accept the release.

The *Sharâya* mentions simply that a release is valid without acceptance; but it does not say what the result would be if the debtor rejects it. In the *Jáma-ush-Shattát*, however, a case is given from which it would appear that the result would be the same under the Shiah law as under the Sunni law, *viz.*, that when the creditor discharges the debtor, he cannot again enforce the liability, but the debtor may insist upon his performing any obligation which rests on the creditor, or forcing him to accept the debt.

What may or may not form the subject of *hiba*.

Speaking of the subject-matter of gifts, what may or may not form the subject of *hiba*, the *Fatáwa-i-Alamgiri* has the following :—

"The thing itself must be in existence at the time of

[1] *Sharâya-ul-Islam*, p. 242.

[2] According to the *Jâma-ush-Shattât*, the gift of a debt to a third person is valid according to *urf* (custom).

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the gift, so that if one should give the fruit that may be produced by his palm-tree this year, or what is in the womb of this slave, or of this sheep, or in its udder, the gift is unlawful though power be given to take possession at the time of production, as of birth, or of milking; so also as to the butter in milk, the oil in sesame, or the flour in wheat with similar powers. The subject of the gift must also have legal value, and possession must be taken of it to establish in it the right of the donee, and if in its nature divisible it must be divided and distinguished from, and not joined to, or occupied with anything else that is not given. Hence the gift of land without the crop then standing on it, or of a palm-tree in bearing without its fruit, and *vice versâ* is unlawful. So also of a house or vessel in which there is something belonging to the donor without its contents."

Mushaâ. Divergence between the schools.

As regards the latter principle, there is considerable difference between the Hanafis on one side and the Shâfeïs and the Shiahs on the other. Under the Hanafi law, if the subject is in its nature divisible, or forms part of a thing which is capable of physical partition or division, the gift is not valid until it is divided off, or separated from other property of the donor which is not given. But where it forms part of an indivisible thing, or of a thing which can not be divided without considerable damage to the entire property, the gift is valid though there is no partition.

The Shiahs and Shâfeïs differ *in toto* from the Hanafis regarding this principle. They maintain that the gift is valid in either case, because a gift is a *tamlik* and valid as such in respect of all things whether they form portions of a divisible or indivisible thing. The Shiahs, however, insist that there must not be a complete ignorance as to the substance of the gift, *viz.*, that the sub-

ject should be sufficiently indicated in order to leave no room for doubt as to what is given. Indefiniteness or ignorance as to the very subject-matter of the gift would avoid the grant, but not mere ambiguity which can be explained by other circumstances. According to the Shâfeïs, mere indefiniteness does not render a gift void, for an undefined but known share may be as much the subject of proprietary right as a definite specific share.

Impartible *mushaâ.*

According to the *Fatâwa-i-Alamgiri*, "the gift of a thing which is separated from, and emptied of, the property and rights of the donor is lawful, so also of a *mushaâ* or undivided part of a thing that does not admit of partition, or is of such a nature that some kind of benefit or advantage that can be derived from it while whole or undivided, cannot be derived from it after partition, as for instance a small house or a small bath. But the gift of a *mushaâ* in a thing that admits of partition, consistently with the preservation of all the uses which might be made of it before partition, is not valid. What is required is, that the thing given be partitioned and separated at the time of taking possession, not at the time of gift."

"The gift of a *mushaâ* or undivided part of what does not admit of partition is lawful to a partner or to a stranger. The gift of a *mushaâ* in what does admit of partition is not lawful either to a partner or one who is not a partner, and if possession is taken of it, Hisam-ud-din has reported that it will not avail to establish property in the donee, but he has said in another place that it will avail to establish it *invalidly*, and so it has been decided." The subject of *mushaâ* has furnished a fruitful source of discussion in the law courts of this country, and the difficulties with which it is surrounded render it necessary, that the meaning of the doctrine, its *raison d'être* and the legal principles which govern it, should be considered with some degree of care.

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Mushaá—its *raison d'être.*

Mushaá has been defined by Freytag as meaning "pluribus communis." Every joint undivided property subject to the right of more than one individual is a *mushaá*. The word *mushaá* is derived from *shuyúh* which means confusion. Where several persons own a particular property joint and undivided, no one of them can predicate that his interest is attached to any specific portion. The gift by one of the co-sharers of his share in such a property is likely to create confusion in its enjoyment by all the co-sharers. It will be seen, therefore, that the doctrine of *mushaá*, which implies a prohibition against the *hiba* of joint undivided properties which are partible in their nature, owes its origin among the Hanafis to a rather nervous dread on the part of some of their principal lawyers, notably Abû Hanifa, that unless divisible things were divided off, it would give rise to disputes and complications in the enjoyment of such subjects.

Abû Hanifa carries his objection to indefiniteness, in other words, to the gift of joint undivided property which is capable of partition, to the utmost limit. But there is a marked difference between him and his disciples on the point in question. Generally speaking their views are more in accord with the requirements of a progressive community and less casuistical than those of Abû Hanifa. The following passage from the *Alamgiri* will bring into prominent relief, not only the views entertained by the early writers on the subject, but also the nature of the divergence between the master and disciples, though the principles laid down therein must be taken subject to the enunciation of later authorities.

"The gift of a *mushaá*," says the *Fatáwa-i-Alamgiri*, "that admits of partition to two men or to a group is valid according to the two disciples, and invalid according to

Abû Hanifa. But it is not *void*, so that it avails to the establishment of property by possession. Sudr-ush-Shahìd has remarked that when a person has given what admits of partition to two men, so that the gift is invalid according to Abû Hanifa, and possession is then taken, *the right of property is established in them invalidly, and so it has been decreed.* Confusion on both sides in property susceptible of partition prevents the legality of gift according to them all, and when the confusion is only on the side of the donee, it prevents the legality of the gift, according to Abû Hanifa, *though it has not that effect in the opinion of the disciples.* And if one should make a gift to two persons who are poor, it would be lawful according to them all, as in the case of *sadkah*, or alms. But if they are rich, and the gift is made to each of them in halves, or if it is made vaguely, by saying, 'I have given to you both,' or with an excess in favour of one, as by saying, 'To this one a third of it, and to this one two-thirds of it,' it is unlawful in the three cases according to Abû Hanifa; while, according to Mohammed, it is lawful in them all; and according to Abû Yusuf, it is lawful in the two cases where the gift is made to both indefinitely, or in halves, but is not lawful with any excess in favour of one of them. When two persons have given a mansion to one person, the gift is valid, according to all opinions."

"A gift by one person to two others of the half of two slaves, or of two or ten pieces of cloth of different kinds, as cloth of Merv and cloth of Herat, is lawful when followed by possession. So also of cattle of different kinds. But if the cloth or cattle be of the same kind, the gift is not lawful, unless a partition is first made. In like manner, the gift of a share in a wall or way or bath is lawful, *when accompanied with a power to take possession.* As,

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for instance, when a house is given with all its rights and boundaries, which include a party wall, or a right of way, held in common with other persons, the gift is lawful as to these also."

"If half a mansion were given by way of gift, or in charity, and delivered, and the donor should then sell, or give it by way of charity to another person, it is mentioned in the *Asal* that the sale would be lawful. And it is also reported in the *Asal* that if half a mansion were given to a person, and delivered to him, and the donee should sell it, the sale would not be lawful, and it is expressly stated in some *fatáwa* that this is approved. But it is said in other authorities, *that possession under an invalid gift avails to the establishment of property, and that it has been so decided, contrary to what is stated to be valid in the Imadiah; and the word fatwa, or decision, is stronger than the word valid.*"

Possession validates gift of *mushaâ.*

"If a man should make a gift of a mansion in which there are some effects belonging to him, and should deliver the mansion to the donee, or deliver it with the effects, the gift would not be valid. But there is a device by which a valid gift can be made of the mansion; and it is by first making a deposit of the effects with the donee, vacating them for him, and then making delivery of the mansion. And, in the opposite case, if he should make a gift of the effects without the mansion, and vacate them for the donee, and then make delivery of the mansion, the gift would be valid; and if he should make a gift of the mansion and effects together, and vacate them both for the donee, the gift would be valid. If a separation is made in the delivery, as by giving one of the two and delivering it, and then by giving the other and delivering it, and a beginning is made with the mansion, the gift of the mansion is not valid, but that of the

effects is valid, while, if a beginning were made with the effects, the gift of both would be valid together. And if one should give land without a growing crop, or the crop without the land, or trees without their fruit, or fruit without their trees, and vacate them for the donee, the gift would not be valid in either case; for the union of each with its fellow is such that the parts of one are in contact with the parts of the other, and the gift is like that of a *mushaâ* in a thing susceptible of partition. But if he should give each of them separately, as, for instance, the crop and then the land, or the land and then the crop, and deliver them together, the gift would be lawful as to both; while, if he separate them in delivery, it is valid as to neither, whichever he may begin with. If he gives the mansion and does not deliver it till he gives the effects also, and then delivers them together, the gift is lawful; in the same manner as when one gives a bag and corn sacks, and does not deliver them until he makes a gift of the corn contained in them, and then delivers both, the gift is lawful as to the whole. But if the mansion is given empty, and then delivered *mushghûl*, or occupied, it is not valid; nor would his saying, 'Take possession,' or 'I have delivered,' be valid when the donor, or his people, or goods are in the mansion."

Gift of things occupying and occupied.

"The gift of a *shâghil*, or thing which occupies another, is lawful, but the gift of the *mushghûl*, or thing occupied, is unlawful. The principle in this kind of cases is that the thing given being occupied with property of the donor prevents the taking of possession, which is necessary to the completion of the gift, but that the thing given occupying the property of the donor has not that effect. As an example of this, the gift of a leathern bag, in which there is food of the donor's, is not lawful, while

LECTURE II. a gift of the food in the bag is lawful. And if one should give a beast of burden having a load upon his back, the gift would not be lawful; but if the burden is given, and beast and burden delivered together, the gift is lawful. So also the gift of a pitcher without the water in it is not lawful, but the gift of the water without the pitcher is lawful. *If a man should give the crop on his land, or the fruit on his tree, and direct the donee to reap or to gather it, and he should do so, the gift would be lawful on a favourable construction;* but if he is not permitted to take possession and does so, he is responsible."

A gift rendered void by a right being established in part of it.

"If a person should give a mansion with its effects and deliver them both, and a right is subsequently established to the effects, the gift of the mansion is valid. So also if one should give sacks with goods in them, or a bag with the food in it, and deliver them to the donee, and a right is subsequently established to the contents in either case, the gift remains complete as to the sacks and the bag. But if one should give a mansion of which possession is taken, and a right is then established in a part of it, the gift is void. And if one should give land with the crop upon it, or a tree with the fruit on it, and make delivery of both, and a right should then be established in the crop or the fruit, the gift in the land or trees is void. A person makes a gift of his land with the crop on it, and cuts and delivers the crop, after which a right is established in one of them, the gift is void as to the other.

Gift by one partner to another of a share in the profits not unlawful.

"When a man has given property which is in *muzaribat*, *i. e.*, invested in partnership business, to the *muzârib*, *i. e.*, managing partner, and part of it is in his hands, and part of it due by others, the gift is lawful as to the former, but as to the remainder it is lawful only if the donor have said, 'Take possession;' and if any part of

the property be profit, the gift is not lawful. When one of two partners has said, 'I have given thee my share of the profit,' it has been said that if the property itself be in existence, the gift is not valid, by reason of its being *mushaá* in what admits of partition; but if the partner has lost the property, the gift is valid by reason of its being an *iskát*, or extinction of right."

It will be seen from the above extract, which has been given *in extenso*, in order to bring clearly before you the condition of society in which the rules were promulgated, what were the subjects to which they were in the main applicable.

Kabz-ul-kâmil, or complete possession.

The principles, therefore, have been construed by the later lawyers most liberally, as I shall endeavour to show, and also to prove that the spirit of the Mahommedan Law, even where it has been subjected to patristic influences, is in accord with the requirements of progress. Bearing in mind the principle, that possession validates an imperfect or incomplete gift, the author of the *Majma-ul-Anhar*[1] defines thus the term *kabz-ul-kâmil*, "complete possession:—and the meaning of *kabz-ul-kámil* (complete seisin) with reference to moveables depends upon their nature, and with reference to immoveable property as is suitable to its nature, as the taking of the key of a house, which is equivalent to its seisin." * * * "According to Abû Hanifa, if a person make a gift of his house to two people, it is not valid and (this is his view) regarding all objects which are capable of division, but according to the two disciples the gift is valid."[2] Nor is it valid according to Abû Hanifa, if the donor define the shares. "But the accepted doctrine is directly opposed to his view. If a man make a gift of a moiety of his house in favour of one

[1] p. 342.

[2] Fatâwa-i-Kazi Khan, (Cal. Ed. II, p. 282.)

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Possession perfects an invalid gift.

A hiba-bil-mushaâ or a gift of an undivided joint property does not appear, therefore, to be void but only invalid, and possession remedies the defect.

The *Majma-ul-Anhar*[2] says "and Yakub Pasha has held, that if a person make a gift to two persons of a thing which is capable of division, that is an invalid *hiba*, but it is not (*batil*) void according to Imam Abû Hanifa, so if the donees take possession, it establishes property in them according to his saying and the *fatwa* is according to it." This view is in exact accordance with what Sudr-ush-Shahîd holds. That a right of property in a share of a joint undivided property comes into existence upon possession being taken of it is clear from the following passage in the *Majma-ul-Anhar*:—"In the *Jâma-ul-Fusulain* and *Bazâziah* it is stated that *hiba-i-fâsid* is perfected by possession and the *fatwa* is according to this, though some have said, the other is correct, but the word *fatwa* is stronger than correct." Regarding the words of the author that *mushaâ* prevents the completeness of a gift, the commentator says, "the reason is that seisin is necessary, so it is mentioned in the *Fusulain*, but Zailye has held that the gift of such a thing in which the right of the donor is attached is invalid, and in the *Imadiah* it is stated that the gift is only incomplete; and Hamawi has stated in his commentary on the *Ashbah* that this doctrine is subject to two sayings owing to which difference has arisen regarding such *mushaâ* which

[1] Kazi Khan, p. 282.

[2] p. 345.

is capable of division, that is, whether such *hiba* is void or only incomplete, *but it is more correct that it is incomplete as is stated in the Bazaziah.* And in the *Durrur-ul-Ahkám*[1] it is stated that an invalid *hiba* (gift) confers the right of property by possession and the *fatwa* is upon this, so in the *Fusulain*."

The *Radd-ul-Muhtâr* commenting on the above says, "in the *Durrur* it is stated from the *Fusulain* that possession under an invalid gift would avail to establish the right of property and the *fatwa* is in accordance with this. And so also it is stated in the *Bazaziah*, which is contrary to what is mentioned as correct in the *Imadiah*," but the word *fatwa* is stronger than the word *correct* &c.[2]

Actual possession, however, does not seem to be necessary to complete the *hiba*, or at least to destroy the defect arising from the fact of a certain property being *pluribus communis*. The authority to take possession is regarded by the jurists as sufficient.

Authority to take possession.

"In the *Himâdia* it is stated from the *Jâma-ul-Fatâwa*, that if a person make a gift of the crop which is standing on the land, or of the dates which are hanging on the trees, or of the scabbard which is on the scimetar, or of a building, or of dinars which are owing from another person, or of anything which may be measured, and authorize (the donee) to reap it, or to take it down, or to take it off, or to take possession thereof, or to measure it, *and* (*the donee*) *has done it*, it is valid by a liberal interpre-

[1] p. 272.

[2] لكن فيها (اي فى الدرر) عن الفصولين الهبة الفاسدة تفيد الملك بالقبض و به يفتى و مثله فى البزازية على خلاف ما صححه في العمادية لكن لفظ الفتوى اكد من لفظ يصح كما بسطه المصنف مع بقية احكام المشاع و هل للقريب الرجوع فى الهبة الفاسدة قال فى الدرر نعم و تعقبه فى الشرنبلالية بانه غير ظاهر على القول مفتى به من افادتها الملك بالقبض Vol. IV, p. 781.

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tation.[1]" And, again, "if the donor himself or his deputy makes a division, or if the donor authorizes the donee to make the division with his partner, this makes the gift complete (*kâmil*).[2]" And this opinion is still further enforced by reference to Kazi Khan. "If a gift be made to a man, and he appoint two persons to take possession on his behalf, and they both take possession, that is lawful as is stated in Kazi Khan."[3]

Doctrine of *mushaâ* not applicable to zemindaris.

From the examples given in the Arabian law works, it can easily be inferred that the doctrine of *mushaâ* was applicable only to small plots of lands and houses; it does not seem to have been contemplated by the Arabian jurists, that the doctrine should be applicable to specific shares in large estates or zemindaris. At the time when this doctrine was first enunciated among the Hanafis, there does not appear, from contemporaneous records, to have existed large estates such as are known to us in this country. The Arab conquest had broken up the landed proprietary of ancient Persia, and the *Dehkan* who was a zemindar under the Sassanides became a mere husbandman. Under the Arab rule, the land of the country was distributed either among the Arab colonists, or allowed to remain in the hands of the old proprietors on a scale which would prevent them forming a combination to destroy the new government; such seems to have been the economic condition of society about the beginning of the Hanafi law, and the time when the early jurists of that school flourished. The wealth of the people was chiefly derived

[1] *Radd-ul-Muhtâr (Shami)*, Vol. IV, p. 782.

[2] *Ibid.*, p. 780.

فان قسمه الواهب بنفسه او نائبه او امر الموهوب له بان يقسم مع شريكه

Delivery of possession *(taslim)* is presumed. * كل ذلك تتم به الهبة

[3] *Ibid.*, p. 779.

وكل الموهوب له رجلين بقبض الدار فقبضا ها جاز - خانيه -

from common trade, immense flocks of sheep and goats, large groves and plantations. Apparently, therefore, the doctrine of *mushaá* was not intended to apply to large landed estates such as came into existence in later times. LECTURE II.

The Judicial Committee of the Privy Council, in the case of *Abedoonnissa* v. *Ameeroonnissa*, discussed the question whether the objection of invalidity to a gift on the ground of *mushaá* was applicable to shares in a zemindary which themselves paid revenue separately. *Abedoonnissa v. Ameeroonnissa.*

"A legal objection to the validity of these gifts was made in the High Court on the ground that the gift of *mushaá*, or an undivided part in property capable of partition, was by Mahommedan law invalid. This point appears to have been taken for the first time in the High Court, and was argued at this bar. That a rule of this kind does exist in Mahommedan law with regard to some subjects of gift is plain. The *Hedáya* gives the two reasons on which it is founded: First, that complete seisin being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and, secondly, because it would throw a burden on the donor, he had not engaged for, *viz.*, to make a division. (See Book XXX, c. i, 3 vol. 293.) Instances are given by the writers of undivided things which cannot be given, such as fruit unplucked from the tree, and crops unsevered from the land. It is obvious that with regard to things of this nature separate possession cannot be given in their undivided state, and confusion might thus be created between donor and donee which the law will not allow."

"In the present case the subjects of the gift are definite shares in certain zemindaris, the nature of the right in them being defined and regulated by the public Acts of the British Government."

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"The High Court, after stating that the shares, were for revenue purposes distinct estates, each having a separate number in the Collector's books, and each being liable to the Government only for its own separately assessed revenue, and further that the proprietor collected a definite share of the rents from the ryots, and had a right to this definite share and no more, held that the rule of the Mahommedan law did not apply to property of that description."

"In their Lordships' opinion this view of the High Court is correct. The principle of the rule and the reasons on which it is founded do not in their judgment apply to property of the peculiar description of these definite shares in zemindaris, which are in their nature separate estates with separate and defined rents. It was insisted by Mr. Leith that the land itself being undivided, and the owners of the shares entitled to require partition of it, the property remained *mushaâ*. But although this right may exist, the shares in zemindaris appear to their Lordships to be, from the special legislation relating to them, in themselves and before any partition of the land, definite estates, capable of distinct enjoyment by perception of the separate and defined rents belonging to them, and therefore not falling within the principle and reason of the law relating to *mushaâ*."

When a gift *bil-mushaâ* is made of property that does not admit of partition, it is a condition of the gift that the quantity be known or specified,[1] for if one were to give his share, the share being unknown, the gift would not be lawful as ignorance of the share might lead to disputes.[2]

Jaffar Khan v. Hubshee Bibi.

In the case of *Jaffar Khan* v. *Hubshee Bibi*,[3] it was held by

[1] *Sahiba Begum* v. *Atchamaun* and others, 4 Mad. Reports, p. 115

[2] Fatâwa-i-Alamgiri, IV, p. 523.

[3] 1 Sel. Rep., p. 12.

the Sudder Court, that a gift of land forming part of joint property to be valid must be distinct, and the boundaries and extent of the property given be known.

The older rulings of the Sudder Court, it must be admitted, gave effect to the objection based on the ground of *mushaá* to an extent perhaps not warranted by the spirit of the Mahommedan Law.[1] But the more recent decisions of the High Courts of Calcutta and Allahabad have taken a broader view of the question, and more in accordance with the principles enunciated in modern works like the *Majma-ul-Anhar* and the *Radd-ul-Muhtár*. In the case of *Jewan Buksh* v. *Imtiaz Begum*,[2] however, the learned judges seem to have gone beyond the limits laid down by the modern Mahommedan jurists. In that case, the daughter of a deceased Mahommedan sued to set aside a gift of her father's estate made by him during his lifetime to the defendant his eldest son, and for possession of her share. It appeared that the gift to the defendant by the father comprised, amongst other properties, one-third share in certain joint and undivided zemindary villages. As the holder of these shares, the defendant's father was entitled to a one-third share of the profits of the villages after payment of the Government revenue village expenses and costs of collection. The plaintiff contended that the gift of these shares was invalid on the ground of *mushaá*. The High Court held, that the gift of a defined share of landed estates was not open to the objection of *mushaá*, a defined share in a landed estate being separate property. This view appears to go beyond the expositions of the Musulman jurists, though

Jewan Buksh v. *Imtiaz Begum.*

[1] *Meer Abdul Kureem* v. *Musst. Fuckrunnissa Begum*, 3 Sel. Reports, p. 44 note; *Syud Shah Basit Ally* v. *Syed Shah Imam-ud-din*, 3 Sel. Rep., p. 176; *Musst. Khanum Jaun* v. *Musst. Jaun Bibee*, 4 Sel. Reports, p. 210.

[2] I. L. R., 2 All. p. 93.

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it may not probably be inconsistent with the spirit of the law.

Kasim Hussain and another v. *Sharif-un-nissa.*

In *Kasim Hussain* and another v. *Sharif-un-nissa*,[1] in which the gift was by one person of two donees, the *hibanamah* was in the following terms :—

"I Bechi do hereby declare that one-twelfth *muafi* share, and a dwelling-house containing a room facing north and east, and five yards of land in front thereof, two halls (*dalan*) facing the east, a door, a privy, a court-yard and a stair-case constitute my ancestral property, and are held by me under a partition deed. I have made *Kasim Hussain* and *Nazim Hussain* (defendants) absolute owners of the above property together with all its boundaries, '*asli*' and '*dakhili*' rights, whether large or small, and appertaining to it. The property is free from the right of any one else and unincumbered by hypothecation, charge, gift, sale or mortgage. There is nothing to prevent the validity of the transfer, and the property is in my exclusive possession up to this day, and I have placed them in proprietary possession thereof. Neither I or my heirs have any right or interest left in it. I have substituted (*Kasim Hussain* and *Nazim Hussain*) on the following terms :—During my lifetime the income of the property shall remain under my control; after my death they shall become absolute proprietors thereof in equal shares, and apply its income to meet their necessary expenses, they shall not have power at any time to transfer or create a charge upon the property; should they directly or indirectly transfer the property, such transfer shall be invalid in Court in face of this instrument."

Upon a suit by one of her heirs, two grounds were taken to set aside the deed, *first* that it was a will, and therefore invalid as regards two-thirds, being without the consent

[1] I. L. R., 5 All. p. 285.

of heirs,[1] *second*, that the gift was bad on account of *mushaá*. With reference to the *first* objection, the learned judges held as follows :—

"The deed purports to transfer the title in the donor's share in the *muafi* state to the defendants and constitutes them proprietors, but reserves to the donor the income for life. A gift of specific shares is not open to objection under Mahommedan Law, and the gift is not otherwise void by reason of the condition for reserving to the donor the profits either for want of the seisin required by Mahommedan Law of the property given, or in consequence of the condition vitiating the gift. It was held by the Privy Council in *Nawab Umjad Ally Khan* v. *Mohumdee Begum* that though the transfer of a legal title will satisfy that provision of the Mahommedan Law which relates to the point of seisin in its legal and technical sense, yet that alone will not suffice when no intention exists to transfer the beneficial ownership either present or future, but when there is real transfer of property by a donor in his lifetime under the Mahommedan Law, reserving not the dominion over the *corpus* of the property, nor any share of dominion over the *corpus*, but simply stipulating for, and obtaining a right to the recurring produce during his lifetime, there will be a complete gift by Mahommedan Law. Their Lordships observe :—

'The text of the *Hedaya* seems to include the very proposition and to negative it. The thing to be returned is not identical but something different. See *Hedáya*, Chap. Gifts, Vol. III, Book XXX, p. 294, where the objection being raised that a participation of property in the thing given invalidates the gift, the answer is, the donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use of the whole indivisible

[1] 11 Moore's Ind. App. p. 510.

 article, for his gift related to the substance of the article not to the use of it.' In that case the subject of the gift was Government Promissory Notes, the interest of which had been reserved by the donor, and their Lordships go on to say :—' Again, if the agreement for the reservation of the interest to the father for his life be treated as a repugnant condition, repugnant to the whole enjoyment by the donee—here the Mahommedan Law defeats not the grant but the condition Hedaya, Chap. Gifts, Vol. III, Book XXX, p. 307.' The mere reservation of the income of the estate will not therefore vitiate the gift, and the Subordinate Judge's finding in this respect is erroneous. The deed contained a condition against alienation, but that will not vitiate the gift. With reference to the second ground of objection the learned judges said as follows :—

"The appellant's objection as to the finding in respect of the staircase, door and privy is also valid. This portion of the gift his been disallowed because the above things are undivided."

"On this subject *Hedâya* on 'Gifts', Book XXX, Ch. I is as follows :—' A gift of part of a thing which is capable of division is not valid, unless the said part be divided off, and separated from the property of the donor, but the gift of part of an indivisible thing is valid.' The things referred to appear to be common to the occupants of the premises which in other respects were divided, and are incapable of division, and the donor gave all her interest in them to the donees, the gift is not, in consequence, invalid. It is obviously absurd to give effect to the gift in respect of a house, and disallow all means of ingress and egress.'"

A gift of a property jointly to two donees is valid if they are authorized to make a partition among them-

selves, or if they take possession of the subject-matter of the gift. But there seems to be a doubt when one of the donees is a minor and the other an adult. "Some of our doctors," says the *Radd-ul-Muhtâr*, "are of opinion, that if a gift is to a minor and an adult jointly without division of their specific shares in *mushaâ* property it is invalid, and as the minor cannot himself take possession of his share, the gift cannot be completed." According to Abû Hanifa, however, as already stated, there is no distinction whether the gift is made to two *kabir* or adults, or one adult and the other a minor or both minors.

And again, "if the gift is to one adult and one minor, the latter being in the *parwarish* (custody) of the former, or to two sons one adult and the other a minor, it is not valid." The reason upon which these principles are founded appears far-fetched, though the Allahabad High Court apparently recognized it in the case of *Nizâm-ud-din* v. *Zabida Bibi.*[1]

Nizum-ud-din v. *Zabida Bibi.*

In this case it appeared that one Sheikh Kadir Buksh devised certain property amounting to a one-fourth share of his estate to his eldest son Zahir-ud-din, subject, however to this reservation, *viz.*, that a portion of the property situate on the north side of the river Ravi, and consisting of "lakheraj lands should pass on the testator's death to Zahir-ud-din, but that the remainder situate on the south of the river should be held and possessed by the testator's youngest son Aman-ullah for the purpose of collecting and paying the revenue due on both portions without any rendition of accounts, until such time as a competent son should be born to Zahir-ud-din," the reason being that Zahir-ud-din was unfit to look after the lands paying revenue to Government. On the death of their father, Zahir-ud-din and Aman-ullah held and possessed the pro-

[1] 6 N. W. P., H. C. Reports, p. 538.

LECTURE II. perty above-mentioned in accordance with the will of the testator. On the 1st of September, 1864, Zahir-ud-din executed a deed of gift of the one-fifth share devised to him in favour of two of his sons, Nizam-ud-din and Sadr-ud-din a minor. No mention was made in the deed as to the respective shares of the brothers, or as to the manner in which the property was to be held or divided. The deed was duly registered, and mutation of names was effected in respect of the lands on the north of the river Ravi in the same year. Zahir-ud-din died in 1869, leaving several daughters and a minor son, born after the execution of the deed of gift in favour of Nizam-ud-din and Sudr-ud-din, never having held possession of the property on the south side of the Ravi, which had remained in the possession of Aman-ullah and his son, who rendered no accounts of profits to Zahir-ud-din, and it was not till the year 1871 that the donees obtained possession. With regard to the property on the north bank of the Ravi, it appeared that the donees had been put into immediate possession. Upon a suit instituted by Zabeda Bibi, one of Zahir-ud-din's daughters, to recover the share of the property left by her father to which she was entitled under the Mahommedan Law, by the cancelment of the deed of gift, the first court held that the deed was valid, the property given being therein defined and specified. The Lower Appellate Court reversed the decree and remanded the case for the determination of the amount of the mesne profits due to the plaintiff, holding that the deed was, under Mahommedan Law, invalid, as the gift had been made without division or detail of the respective shares of the donees and as the donees had not obtained possession of a portion of the property, *viz.*, that situate on the south of the river Ravi, till after the decease of the donee. The Court, however, did not distinctly determine whether the deed

had operated immediately in respect of the portion lying on the north of the river. It found that there were no good reasons for thinking the donor insane, or even a simpleton, although his father had refused to allow him to manage lands paying revenue. In special appeal, the principal grounds were to the effect that the deed of gift was not invalid under the Mahommedan Law, as the donees had received such possession as the donor could grant of the lands on the south of the Ravi, and had received actual possession of those on the north, and, although a gift of undivided property was contrary to that law, yet, as the donees had obtained possession, the gift was not absolutely invalid.

The High Court held as follows :—

" In this case the claim of the plaintiff to a daughter's share in the estate left by her father, Zahir-ud-din, is resisted on the ground of a deed of gift executed by him, a somewhat weak person, in favour of the appellants, his sons, in 1864. Another son was born to him after that date, so that the effect of the deed is to exclude from inheritance, for no sufficient apparent cause, the younger son as well as several daughters. The Court of first instance, holding the deed to be valid, dismissed the claim. The lower appellate Court considered the deed to be invalid for three reasons : (1) that the property, the subject of the gift, being capable of partition, had not been divided between the two donees ; (2) that part of it was not at the time of the execution of the deed in the possession of the donor himself ; and (3) could not therefore be transferred by him to them. As to the other portion of the property, which was admittedly in his possession at that time, the lower Courts have not enquired or found so carefully as they should have done whether the deed took effect before Zahir-ud-din's death. If it operated

 immediately in respect of the property on the north side of the river Ravi, and the opinion of the lower Courts seems to lean to this view, which is also supported by good *primâ facie* evidence, we should not be able to allow that it had failed to operate in respect of the property on the south side of the same river. The latter portion of the property was in the charge of a trustee, who was bound to pay out of its profits the whole of the revenue assessed on both portions. The person or persons in possession of the northern portion could scarcely be deemed to be out of possession of, and not to derive any benefit from the other portion which paid the revenue due from him or them. At all events the donor gave to the donees such possession as he himself had, and could give, of the southern portion. But, although the soundness of the 2nd and 3rd reasons of the Judge's decision may be doubted, we are not prepared to say that his first reason is wrong. The general rule of the Mahommedan Law is that anything which is capable of division, when given to two persons, should be divided by the donor at the time of the gift, or immediately subsequent thereto and prior to the delivery to the donees, in order that the objection of confusion may be avoided, and full and complete seisin obtained. But it is contended on behalf of the appellants that, although the gift of undivided property is contrary to law, it is not, if the donees have obtained possession of it, absolutely invalid. This contention is supported by the opinion of the two disciples, while it is opposed to that of Hanifa. But it appears from a passage in the *Durr-ul-mukhtar* and a passage in the *Fatawa-i-Alamgiri*, that in a special case like the present in which one of two donees is an adult, and the other an infant son, a gift of undivided property is absolutely invalid, not merely *fasid* but *batil*. The reason

of this rule is explained, and although the rule may, it is intimated, be evaded by a particular device, which is not quite clearly intelligible, there is no pretence that such device was employed by the parties to the deed in question in this case."

"The weight of authority appears then to be in favour of the conclusion at which the lower appellate Court has arrived, and that conclusion may be upheld upon the basis of Mahommedan Law. Had it been otherwise, it might have been our duty to consider whether we were bound strictly to apply Mahommedan Law to the case, or to deal with, and dispose of it according to the principles of equity, justice, and good conscience. Without entering upon such a discussion, we may content ourselves with remarking that, as the deed is found to be invalid under Mahommedan Law, justice, equity, and good conscience do not, under the circumstances to which we have adverted, require us to maintain it. Twelve years have not elapsed since it was executed, and the heirs of Zahir-ud-din, who might, were he still alive, set it aside as not binding on himself, are fully competent to impugn its validity."

Gift to an infant and adult jointly.

It is somewhat difficult to follow the reasoning in the latter portion of the judgment, and it would seem that the reason upon which the Hanifi doctrine is founded, has been, to some extent, missed. There can be no question that the principle owes its origin, as has already been pointed out, to the fear displayed by Hanafi lawyers regarding the enjoyment of a joint undivided property. It is supposed that when a gift is made to A. (who is *sui juris*) and B (a minor living under the guardianship of A,) the possession of B will be so confused as to give rise to considerable disputes. Similarly, when a gift is made jointly to an infant and an adult son, the father would, *quâ* guardian remain in possession of the infant

Lecture II. son's share, whereas the adult son would take possession of the share given to him. The enjoyment of the property consequently by the two donees would be likely to create confusion, not only among themselves but also among them and the donor. And this confusion and difficulty would be enhanced, in case there happened to be creditors of the father, who alleged that the gift was in fraud upon them. Looked at from this point of view it would appear extremely probable the principle was originally framed, partly with the object of protecting creditors and partly with the object of avoiding all question, on the part of the donor or his representatives, as to the completeness of the transaction. The donee takes under an act of bounty or mere *taburru* (تبرع). As a mere volunteer, his title to the gift is not perfected, until the donor has completely manifested his intention to vest the property in him. This intention is evidenced by his placing the donee in possession of the subject of the gift or by authorizing him to take possession of it, and by so differentiating it from his other properties or those belonging to his co-sharers, as to leave no room for confusion. Until this is done there is no *Kabz-i-kámil* and the gift is a mere inchoate act of bounty.[1] If the donee is an infant, the necessary possession should be delivered to his guardian. But if there are no creditors, for whose debts such property would be liable, and if possession has been taken and held under the gift, it would not be invalid. And it must be borne in mind that in this country, in relation to the gift of landed properties, the law respecting mutation of names and other statutory provisions, for evidencing a *boná fide* transfer of property, affords a sufficient guarantee against any apprehension of mere *benami* transactions.

[1] Comp. *Kekewich* v. *Manning*, 1 De. G., M. & G. p. 176.

That the developed Hanafi law itself disapproves of the strictness of the rule, is amply shown by the following device pointed out by the jurists to escape from the operation of the principle of *shuyuû*.

"But if the gift be to one adult and one minor, the latter being in the *parwarish* of the former, or to two sons one adult and one minor, it is not valid for possession on behalf of the minor could be taken by his guardian. "However," continues the *Radd*, "there is a device by which a gift jointly to an adult and a minor may be made validly, *viz.*, the entire property may be consigned to the adult, and then a gift of it may be made to both. In such a case, the adult donee would be a trustee for the minor, and possession being already vested in him as depositary, the objection of *shuyuû* would not apply as to the gift of the share of the minor."

"If a man make a gift of ten *dirhems* as *sadkah* or charity to two indigent people, that is, an offering in the way of God; and as the path of truth is but one, such a gift is not bad for *shuyuû*."

A *sadkah* for two rich people is *hiba*, and therefore if there is *shuyuû* in the subject-matter thereof, the gift will not take effect until partition is made. *The objection of shuyuû only renders the gift invalid but not void.*[1] There is considerable difference between a *hiba* which is *fâsid*, that is, null and void, and a *hiba* which is *ghair mukammull*, which is not complete or merely invalid. According to the *Bazâziah*, an invalid gift is validated by possession and decisions are passed according to this doctrine, and not the doctrine in the *Imâdiah*. Accordingly, if a gift is to two individuals, possession taken by both removes its invalidity. In a gift of *mushaâ* which is

[1] Radd-ul-Muhtâr throughout.

partible, if division is effected by the donees though subsequent to the donation, it is valid.

A gift of a moiety of a house (which otherwise would be bad for *mushaâ*) may validly be effected in this way, (according to the *Bazáziah*), that is, the donor should sell it first at a fixed price, and then absolve the debtor of the debt, that is, the price.

Shuyuû, or confusion, in order to render a gift invalid must exist at the time of the gift, and not be supervenient, and it must be such as is recognized by law.[1]

If a man has two dirhems and says to a person that he has made a gift to the latter of one of them, in that case if both are alike in weight and purity, the gift is not valid, but if they are both not alike then it is valid ; for in the latter case, the *shuyuû* cannot be removed by division. In the same way it would be valid were he to give one-third of the two dirhems.

When a choice of one of two things is given to the donee, if the election is made at a time when it is possible to express the meaning with distinctness, it would be valid. For example, if a man were to say to another, "take one of these two pieces of cloth and let the other be for thy son;" in that case, if the donee exercises his choice before either he or the donor has left the *mujlis* (the place where the *aqd* or obligation is made), the gift would be valid.

If a man owe another two things, one cash and the other flocks, and the creditor were to say to the debtor, "I give you one of the *mals* (properties)," it would be valid.

The objection of indefiniteness carried to an extreme

[1] Radd-ul-Muhtâr (Shami), Fatâwa-i-Alamgiri, IV, p. 525.

On the subject of *mushaâ* there is considerable difference on some points between the *Radd-ul-Muhtâr* and the *Alamgiri*, but the expositions contained in the former appear fuller and more developed.

would oftentimes prevent the donee or donees from availing themselves of the power to take possession of the property, and thus imparting to the act of gift that validity which was wanting to it initially. In order to obviate the difficulty arising from such a contingency, the Arabian lawyers have devised the doctrine of *tahlil*, which literally means "rendering lawful," but which, with reference to the subject under review, means the *legalization* on the part of the donor, of the enjoyment of the subject-matter of the gift by the donee and thus rendering it a valid donation. The following examples will throw sufficient light on this branch of the law relating to gifts.[1]

The doctrine of *Tahlil.*

If a person were to say to another, "Whatever of my property thou hast eaten, it is lawful for thee," it would be lawful for him to do so, but should there be any indication of dispute, he should not do so; so it is stated in the *Multikat.*

If a person were to say to another, "Whoever has eaten out of my property, it is lawful for him," the *Fatwa* is that is lawful; as stated in the *Sirâjiah.*

In a tradition reported by *Ibn Makâtil*, it is declared to be lawful for every person whether rich or poor to eat of the fruits of a tree, when the owner has said, "it is lawful for all persons to eat of my tree;" so in the *Fatáwa-ul-Itâbiah.*

If a person were to say to another, "Make it lawful for me all the rights which thou possessest against me," and he does so and discharges the speaker; in that case, if the owner of the rights was aware of his rights, than the speaker will be legally and conscientiously discharged. If, however, the *Sahib-i-hukk* was not aware of his rights, the speaker will be discharged only legally. But Abû Yusuf holds that he will be discharged in conscience also; and the *Fatwa* is on this; so in the *Khulâsa.*

[1] Fatâwa-i-Alamgiri, IV, p. 531.

If a person were to give to another something which the latter mixes with his own goods, and believing fully that he would not be able to distinguish it from them, he asks the giver of the thing to make it lawful on him and he does so, it is lawful. But if he subsequently finds it, he must return it, so in the *Kinia*.

If a person were to say to another, "It is lawful for thee to take from my property whatever thou findest and whatever thou likest," according to Abû Yusuf this is restricted to *dirhems and dinars*. Therefore it will not be lawful for him to take lands or trees or almonds or cow or goat; so in the *Zahîria* and *Khulâsa*.

If a person were to declare that he had made it lawful for another to eat of his *mâl;* and the latter person does not know it,—in such a case, if he were to eat it it would not be lawful, and it is stated in the *Muhit-i-Sarakhsi* and in *Tatar Khaniah* that it is not lawful for him to eat thereof, until he know of the permission.

One man is a debtor of another, who is not aware of the amount of the debt; and the debtor says to him "discharge me from what I owe thee;" and he replies, "I discharge thee in both worlds;" the jurist Nasîr says that the debtor will be discharged only to the extent of the amount which the creditor believed the debtor owed him. But Mohammed Ibn Sulma says that he will be discharged to the full extent of his debt; and the Fakîh Abu'l Lais and others say that what Ibn Sulma has said is the decision of the Kazi, and the saying of Nasîr has reference to the future world, so in the *Zakhîra*.

If a man were to say to another, "It is lawful for thee what thou hast eaten of my property, or taken or given." In such a case, the eating is lawful, but not the taking or giving, so in the *Sirâj-ul-Wahâj*.

* * * * * * * * *

If a person turn loose a sick animal, saying, that whoever should take and use it, it would become his; and suppose another man does take and use the beast, it would become lawfully his property. This is the *dictum* of Abu'l Kasim. LECTURE II.

If a domesticated bird (طیرا مملوکا) is let loose, it is in the position of a sick animal.

If a person were to usurp a piece of property and the rightful owner were to say, "I have made all my rights *halâl* to him," the jurists of Balkh hold, that in this case the usurper is absolved from the liability of damages and not from the restoration of the specific property; so in *Kinia*. It is reported from Mohammed, however, that if one is liable to another for some property, and the owner says, "I have made it *halâl* for thee, it is a *hiba*; but if he had said *tuhhul*, it would be a discharge; so in *Zakhîra*.

If a person were to say همه قرض داران خودرا بحل کردم "I have made lawful (my debts) to all my debtors." This will be a discharge to the debtors, but not to a lessee; so in the *Khulâsa*.

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If a man were to say to his agent (*vakil*), it is lawful for thee to eat of my property from one dirhem to a hundred dirhems, it will not be lawful to the *vakil* to take at once a hundred or fifty dirhems, but only so much as is reasonably necessary for his maintenance; so in the *Multekat*.

SECTION IV.

GIFT OF MUSHAÂ ACCORDING TO THE SHIAH DOCTRINES.

According to the Shiahs, the gift of *mushaâ* or a share in joint and undivided property is lawful,[1] "and seisin of

[1] *Mirza Kasim Ali v. Mirza Mohammed Hassan*, 5 Sel. Reps. 213.

 it is to be taken," adds the *Sharâya*, "in the same way as seisin in sale," that is, "by mere surrender or vacating by the donor." The character of the seisin, as stated before, when dealing with the Hanafi law must depend on the nature of the thing given. And this view is laid down by the *Allâmah* in his *Tahrîr-ul-Ahkâm*. "Mere surrender or delivery of symbolical possession being sufficient in all cases of gift, where the subject is immoveable; where it is moveable, manual or physical possession seems to be required so far as the nature of the article permits."

Under the Shiah law there is no question, therefore, that if a thing is given to two persons *jointly*, and they take possession *jointly*, each donee becomes the proprietor of the portion given to him. If, again, one only of them should accept the gift and take possession while the other refuses, the gift to the acceptor is valid.

As under the Hanafi law, acceptance is a necessary condition to the validity of a gift. "The contract of *hiba*," says the *Sharâya*, "requires declaration and acceptance with seisin or taking possession."

Declaration is the expression of an intention or wish on the part of the donor to transfer to the donee, the right of property by way of a *hiba*. But the contract is not valid, unless the person who makes the transfer is "of full age, sound understanding and unrestrained in the use of his property," in other words, is *sui juris*, capable of understanding the nature of his act, and does not labour under any inhibition.

A discharge or release given by the creditor to his debtor is equivalent to the gift of the debt, and this is valid both under the Sunni and the Shiah Law. Owing, however, to the difficulty of obtaining physical or actual possession of a debt or *chose in action*, some Shiah

lawyers, among them the author of the *Sharáya*, have held that a debt, or rather the right to recover a debt, cannot be assigned to a third person. Other jurists, especially the Shaikh, have held the contrary view, and there can be no question that upon the basis of a correct analogy, and the recognized practice, which has obtained for centuries among Shiah communities, of making valid assignments of *choses in action*, a debt or a right depending on the obligation of another may be validly given or assigned by the obligee or creditor to a third party gratuitously, without any consideration, that is by way of *hiba*.[1] In the case of *Nawab Amjad Ali Khan* v. *Mohamdi Begum*, the gift was of Government Promissory notes. Considered analytically, the gift of the notes amounted in fact to a gift of the right to receive the interest on the money, for which the notes formed the securities. There was no question raised in that case, that such a gift was invalid, because it was the gift of a right to receive the periodically accruing interest, though the parties were Shiahs. The only ground upon which the gift was impugned was, that the donor had reserved a life-interest in the income, and that such reservation was invalid under the Mahommedan Law. It may be taken, therefore, that the assignment of a *chose in action*, or a right in reversion is not invalid under the Shiah law.

[1] Under the English Common Law, the benefit of a contract cannot be assigned (except by the Crown) so as to enable the assignee to sue in his own name. The origin of this restriction was attributed by Coke to a desire on the part of the founders of the English Law to discourage maintenance and litigation, "but," says Pollock, "there can be little doubt that it was in truth a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the creditor and the debtor;" Pollock on Contracts, p. 224.

The view held by some of the Shiah lawyers against the transfer of *choses in action* or assignment of contracts may also be said tö be a logical consequence of their view regarding the principle of seisin.

Lecture II.

Release of a debt.

Among the Shiahs, according to the doctrines of the literal school of interpretation, a release or discharge does not require, for effectuation, the acceptance of the donee; whilst the progressive school represented by the Shaikh hold equally with the Hanafis that the assent of the debtor or the obligor was necessary to the validity of the discharge. And this view seems conformable to the rules of equity. A discharge is a mere declaration on the part of the creditor of his intention, not to enforce the obligation against the obligor. But the expression of an intention not to enforce a liability, which may have the effect of precluding the creditor from enforcing his claim, would not necessarily preclude the debtor from insisting upon the creditor to accept the payment of the debt. Obligation has been defined by an English writer to mean the relation that exists between two persons, of whom one has a private and peculiar right to control the other's actions, by calling upon him to do or forbear some particular thing.[1] The same definition may be applied to the term *aqd* of the Arabian jurists. It implies a relation which, whilst giving a certain right to one person over another, often creates a corresponding liability against him in favour of that other. Proceeding upon the basis of this conception, the Hanafi jurists have held that the "gift" of a debt, *i. e.*, the release of it, to the debtor is complete without his acceptance, though it is reversed by his rejection; but this is correct only with respect to the principal debtor, for the gift of a debt to the surety is not complete without his acceptance, though it is reversed by his rejection. If the creditor releases the principal debtor from his debt. or gives it to him and he accepts, both he and the surety are released, but if he do not accept he is not released.[2] It may be taken there-

[1] Pollock, p. 3.

[2] *Fatâwa-i-Alamgiri*, IV, pp. 535, 536.

fore that the *dictum* in the *Sharáya*, "that a release does not require acceptance" must be read with the light thrown on the subject by the detailed provisions given in the *Jáma-ush-Shattát* which would seem to show that if the release is not accepted, it would have no effect or "be reversed."

CHAPTER II.

FORMALITIES RELATIVE TO GIFTS.

Section I.

Lecture III.

Formalities relative to gifts.

Gifts, under the Mahommedan Law, are not subjected to any formality, or any special publicity; they can be made either verbally or in writing. But, when a gift of immoveable property is made in writing, the provisions of the Stamp and Registration Acts have to be complied with.

In order to create a gift, it is not necessary to make use of any express terms. Even where the declaration and acceptance are not expressed in words, so long as the intention is evidenced by conduct it would be sufficient.[1] If the gift is made in writing or verbally, any word by which it may be presumed that the donor intended to give the substance of the thing, would convey the property in the thing itself. Intention, as gathered from attendant circumstances, must, in cases of doubt, furnish the governing principle. In short, if from the words used it can be inferred that the proprietary right in the *substance* of any object was intended to be conveyed that would be a gift. If, however, it appear that what the donor intended to

[1] هوا لايجاب و في خزانة الفتاوي اذا دفع لابنه مالا فتصرف فيه الابن يكون للاب الا اذا دلت دلالة التمليك بيري قلت فقد افاد ان التلفظ بالايجاب والقبول لا يشترط بل تكفي القرائن الدالة علي التمليك كمن دفع لفقير شئيا وقبضه ولم يتلفظ واحد منهما بشيء وكذا يقع في الهدية و نحوها * *Radd-ul-Muhtâr*, IV, p. 777.

give was only the *munafa* or the usufruct, that would be an *ariat* (commodate loan).[1]

If a man were to give *dinars* to his wife to spend on clothes to wear before him, and she employs them in trade, the profit arising therefrom as well as the money itself would be her property.[2] Clothes for children become their property, but not those made for apprentices or servants.

Conditions necessary for the validity of gift.

As regards the conditions necessary for the validity of the act of gift, they are the following :—

(1) Declaration expressed in any language which conveys the meaning, or expressed by conduct.

(2) Acceptance, expressed or implied.

(3) And seisin by the donee of the subject of the gift.[4]

The *Hedâya* states the principle thus :—

Seisin under Mahommedan Law.

" Gifts are rendered valid by tender, acceptance and seisin. Tender and acceptance are necessary, because a gift is a contract and tender and acceptance are requisite in the formation of all contracts, and seisin is necessary in order to establish a right of property in the gift; because a right of property according to our doctors is not established in the thing given merely by means of the contract without seizin.—Mâlik alleges that right of

[1] والاصل في هذه المسائل انه اذا اتى بلفظ ينبئ عن تمليك الرقبة يكون هبة و اذا كان منبئا عن تمليك المنفعة يكون عارية و اذا احتمل هذا و ذلك ينوي في ذاك كذا في المستصفى شرح النافع • *Fatâwa-i-Alamgiri*, IV, p. 521.

[2] *Fatâwa-i-Alamgiri*, IV, p. 523.

[3] If a man give a thing to another, saying, I give this to thee and the donee take possession of it without saying a word, it is valid.—*Radd-ul-Muhtar*, IV, p. 781.

[4] *i. e.*, if the property is not already in the hands of the donee.

[5] Hed. III, (Eng. Tr.) p. 291.

LECTURE III. property is established in a gift antecedent to seisin, because of its analogous resemblance to a sale and the same difference of opinion obtains with respect to *sadkah* (alms).—The arguments of our doctors upon this point are twofold. First, the Prophet has said, "A gift is not valid without seisin," (meaning that the right of property is not established in a gift until after seisin). Secondly, gifts are voluntary deeds, and if the right of property were established in them previous to the seisin, it would follow that the delivery would be incumbent on the voluntary agent before he had voluntarily engaged for it. It is otherwise, with respect to wills because the time of establishment of a right of property in a legacy is at the death of the testator, and he is then in a situation which precludes the possibility of rendering anything binding upon himself."

In the case of *Nunda Sing* v. *Meer Jaffer Shah*,[1] it was held that a gift depends upon tender and acceptance, but seisin is necessary to make it complete. To some extent the later decisions have overlooked the exact bearing of the question of seisin on the validity of a gift under the Mahommedan Law. It has been supposed sometimes, that actual delivery or transfer of possession is intended by the condition which makes delivery of seisin a condition to the validity of a gift.[2] In this view it becomes necessary to ascertain the exact meaning of the term *Ikbaz* or seisin under the Mahommedan Law. It must be admitted that unless *Ikbaz* (constructive or actual) can be presumed in the donee after the gift, it will not be operative. But upon a consideration of the dicta on the subject, it would appear that actual delivery of possession is not necessary. If the character of the posses-

[1] 1 Sel. Reports, p. 5.
[2] 16 W. R. 188.

sion changes, the mere retention of the subject-matter of the gift in the hands of the donor, would not affect the validity of the gift. He may continue to retain the possession of the property as a trustee or depositary, and such possession will not affect the legality of the transfer.[1] Similarly, if the thing given be in the hands of the donee in virtue of a trust, the gift is in that case complete, although there be no formal seisin, since the actual article is already in the donee's hands whence his seisin is not requisite. "It is otherwise where a depositor sells the deposit to his trustee, for in this case the original seisin does not suffice, because seisin in virtue of purchase is a seisin inducing responsibility, and therefore cannot be substituted by a seisin in virtue of a trust, but seisin in virtue of a gift on the contrary, as not being a seisin inducing responsibility, may be substituted by a seisin in virtue of a trust." The law in cases of gifts to minors looks to the intention of the donor. When there is on the part of a father or other guardian, a real *bonâ fide* intention to make a gift, transmutation of possession is not necessary, the subsequent holding of the property by the donor being considered to be on behalf of the minor. This principle was laid down with considerable distinctness in the case of *Abedunnissa Khatoon* v. *Ameerunnissa Khatoon*, where the Privy Council dealing with the question held that, under the Mahommedan Law, when there is on the part of a father or other guardian a real and *bonâ fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor donee.[2]

LECTURE III.

Ability to take possession is suffi-

According to Kazi Khan, the ability of the donee, if adult, to take possession of the gift,—in other words, to

[1] Hed. (Eng. Tr.) III, p. 295.

[2] *Ameerunnissa Khatoon* v. *Abedoonnissa Khatoon*, L. R. 2 Ind. App. 87.

LECTURE III.

Sufficient in many instances to validate the act of donation.

exercise the right of property over it, is sufficient to validate the act of donation. Accordingly where a gift is made, and a direction is given to the donees to take possession of the subject of the gift and partition it among themselves, such a gift is held to be valid.[1] Power to take possession is equivalent in certain instances to actual delivery of possession. The meaning of this is, where the donor places the donee in a position to exercise the right of property over the subject of the gift, it is tantamount to delivery of seisin. For example, if A. make a gift of his horse which is in his stables to B. and give to B. the key of the place, and authorize him to take possession of it, the seisin is sufficient in law.

But the possession of the donee must be with the permission of the donee. "If the donee," says the *Hedâya*[2] "take possession of the gift in the meeting of the contract of gift, without the order of the giver it is lawful upon a favourable construction. If, on the contrary, he should take possession of the gift after the breaking up of the meeting, it is not lawful unless he have had the consent of the giver so to do. Analogy would suggest that the seisin is not valid in either case, as it is an act with re-

[1] Compare the following from Fatâwa-i-Kazi Khan, p. 282.

في هبة المشاع رجل وهب نصيبه مما يقسم كالدار و الارض و المكيل
و الموزون من غير شريكه لا يجوز عند الكل و ان وهب من شريكه لا يجوز
عندنا و قال ابن ابي ليلي رح يجوز و لو وهب داره من رجلين لا يجوز
في قول ابي حنيفة رح و كذلك كل مايقسم و قال صاحباه رح جاز
و لو رهن داره من رجلين جاز عند الكل و كذا لو آجر داره من رجلين
و لو وهب نصف داره من رجل و وهب النصف الاخر من رجل آخر و سلم
الدار اليهما معاجاز و ان تقدم تسليمه الى احدهما لا يجوز و قال ابو
حنيفه رح لا يجوز في الوجهين *

[2] Hed. III, p. 292.

spect to what is still the property of the giver, for as his right of property continues in force until seisin, that is consequently invalid without his consent. The reason for a more favourable construction of the law in the instance in question is that seisin in a case of gift is similar to acceptance in sale, on this consideration that in the one the effect of the deed (that is, the establishment of a right of property) rests upon the seisin and in the other upon the acceptance. As, moreover, the object of a gift is the establishment of a right of property, it follows that the tender of the giver is virtually an empowerment of the donee to take possession. It is otherwise where the seisin is made after the breaking up of the meeting, because our doctors do not admit of the establishment of the power over the thing, but when seisin is immediately conjoined with acceptance and as the validity of acceptance is particularly restricted to the place of the meeting so also is the thing which is conjoined with it. It is also otherwise where the giver prohibits the donee from taking possession in the place of meeting, for in that case the seisin of the donee in the place of the meeting would be invalid, as arguments of implied intention cannot be put in competition with express declaration."

In fact, the legal effect of a gift is not complete until seisin is taken of the thing given, and in this respect a stranger and the child of the donor are on the same footing when the child is adult. But the possession of the donee must be with the permission of the donor. It is not necessary, however, that the permission should be express. If the permission, or in other words the consent of the donor to the taking of possession can be inferred by conduct, it is sufficient. If the possession is taken immediately after the gift there can be no question as to the validity of the gift, but if after the gift the donor

LECTURE III. prohibits the donee to take possession, and if the donee nevertheless takes possession, it is not valid. Where a gift is made to two persons in succession, and is followed by possession to the second, the second gift is valid.

But the question of possession has such a practical importance in the discussion of cases arising under the Mahommedan Law relating to dispositions of property, that an elucidation of the meaning attached to the word seisin, or its Arabic equivalent *kabz*, is of the utmost importance. The question came up for decision in the Bombay High Court in the case of *Amina Bibi* v. *Khatija Bibi*.[1]

In that case a husband had made a gift of his house and certain tenanted out-offices &c. to his wife. He had made over the keys to his wife, left the house for a few days (to accentuate the fact of delivering possession,) but had returned afterwards and lived with her in the same house until his death. During his lifetime he had collected the rents of the out-offices presumably on behalf of the wife. In a suit by his heirs against the widow to set aside the *hiba* on the ground that no possession had passed, Sausse, C. J. said as follows :

"The acts essential for giving validity to a *hiba* or gift according to Mahommedan Law are tender, acceptance and seisin, but the manner in which seisin is to be effected must be considerably modified to suit the peculiar relations recognised as existing between husband and wife in the Mahommedan Law. The property of each is separate and independent of the other; either can make, and both are encouraged by law to make gifts to the

[1] Bombay High Court Reports, I, p. 157.

I give the Judgment *in extenso*, as it is in every respect one of the most valuable decisions concerning the question of possession under Mahommedan Law.

other in order to promote mutual affection; and so strongly is this principal inculcated that retractation of such a gift is not allowed, although in many other cases it is lawful. A wife can make to her husband a valid gift of the house in which both are residing, although it contain her separate property, and though both continue to reside in it afterwards. Upon principle, I do not see why a husband should not equally be at liberty to bestow upon his wife the house in which both are living, and in which they afterwards continue to reside, provided he have power to make the gift, and do make it *bonâ fide*, and not in contemplation of fraud upon creditors or others. The only difficulty is to comply with the exigency of the law, which requires "seisin" or exclusive possession to be given. If a husband with full power to give executes a deed of gift, and in accordance with its provisions hands over symbolical possession of a house or property by keys, &c. and also, to mark more strongly the *bonâ fides* of the intention, actually goes out of the house before witnesses in order to leave it, and all within it in the full and exclusive possession of his wife, I do not see what further act he could do to give effect to that gift consistently with exercising his other legal rights as a husband. The wife had at that time the power afforded to her of taking and keeping exclusive possession of the gift, and of continuing to reside in the house, but the Mahommedan law gives the husband the right, and moreover makes it his duty, to reside with his wife. If, then, such a clear expression of intention as is contained in the present *hiba* accompanied by such an unequivocal act before witnesses, be not held to give that seisin which is required by Mahommedan law, it would amount to introducing a restriction as to the object of "gift," which is not found, so far as I have been able

LECTURE III. to learn, in any Mahommedan law book. The husband has a general power of making a gift to his wife, but were the present *hiba* to be held to be invalid, it would amount to declaring that a husband shall not under any circumstance make a gift to his wife of the house in which they are at the time residing, and in which they continue to reside down to his death. If such a restriction be unknown to Mahommedan law, there must be some legal mode of effecting the gift of such a property of the husband's. The circumstance of possession once given being subsequently continued does not appear to be a necessary condition of a *complete seisin*, or its non-continuance to invalidate the *hiba*. See the case of *Jaffer Khan* v. *Hubshee Beebee*, 1 S. D. A. Rep. of Bengal, p. 12, referred to in Morley's Digest, Title "Gift," S. 55.

"The 'seisin' of the Mahommedan law appears to be analogous to our livery of 'seisin' as formerly existing in England, and to have been effected much in the same way as by delivery of a sod or twig of the land, or the ring or hasp of a door, in the name of 'seisin.' In Coke on Littleton, 57*a*, it is laid down—'If the deed be delivered in the name of "seisin" of the land, or if the feoffor (or donor) saith to the feoffee (or donee) take and enjoy this land according to the deed, or enter into this land and God give you joy,' these words do amount to a livery of 'seisin.'"

"Two passages from the Tohfa, Vol. IV, pp. 59 and 335, have been relied upon by the defendant to show that a delivery and acceptance of keys of a house is a sufficient seisin or giving of possession in a case of sale and purchase, and also that gifts are in that respect to be treated as sales:—'The giving of the possession of immoveable property to the purchaser depends upon the words expressed by the seller conveying the meaning that

(the house) has been vacated, and in handing over the keys of the house,' Tohfa, Vol. IV, p. 59; and 'The thing of which a 'gift' has been made does not become the property (of the donee) without possession, as is the case with things that are sold, and the declaration of a donor to the effect that he has given possession is sufficient to denote (real) possession;' *Ib.* p. 335." Lecture III.

"In the present case the deed of gift was delivered, and with it the keys of the houses and furniture mentioned in the *hiba*, which included the house in which the husband and wife were then living. No words can be stronger than those contained in this *hiba* to indicate the intention of the donor to complete the gift according to law;—'And I having given up my possession have given them (the houses and *chal*) into the possession of the above-mentioned woman (his wife), in whose favour the gift is made, and all the conditions respecting a gift, *viz.*, the mutual consent and the taking possession in every way, together with the vacating of them, have been performed by me and the above-mentioned woman in whose favour the gift is made;' and again, 'In future I have no claim to the property, nor can any of my heirs demand anything out of the above-mentioned property by way of inheritance.'"

"In my opinion, the relation of husband and wife, and his legal right to reside with her and to manage her property, rebut the inference, which, in the case of parties standing in a different relation, would arise from a continued residence in the house after the making of the *hiba*, and in the husband generally receiving the rents of the *chal* annexed to that house. It is also worthy of remark, that the husband mentioned to some tenants that he was receiving rent on account of his wife, to whom he had made a *hiba*."

"This is not a case of creditors claiming against a *hiba* set up to defeat their claims, but it is that of heirs or next of kin claiming in derogation of the gift of the person through whom they claim."

In the case of *Jaffer Khan* v. *Hubshi Bibi*[1] it was held that where the technical requirement of delivery of seisin is complied with, continued possession is not necessary.

The question whether for the purpose of completing a gift of immoveable property by delivery and possession, a formal entry or actual physical taking of possession is necessary was also discussed before West and Nanabhai Haridas, JJ. in the case of *Shaikh Ibrahim* v. *Shaikh Suliman*.[2] Mr. Justice West laid down the principle of the Mahommedan Law on the question of seisin with considerable distinctness. His Lordship said :—

"As to the law of the case, the Courts below are to bear in mind that when land is occupied by tenants a request to them to attorn to the donee is the only possession that the donor can give of the land in order to complete a proposed gift. Such a possession would, according to the case of *Khajooroonissa* v. *Rowshun Jehan* be sufficient. As to the delivery of the house, the principle is to be borne in mind that when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession. He occupies a certain part and this occupation becoming actual possession by the will of the parties extends to the whole, which is in immediate connection with such part where the possession is rightfully, though not where it is wrongfully taken, *ex parte*

[1] Sel. Reports, I, p. 12.

[2] I. L. R. 9 Bom. p. 146, wherein the cases bearing on this point are referred to.

Fletcher. An appropriate intention where two are present on the same premises, may put the one out as well as the other into possession without any actual physical departure or formal entry, and effect is to be given as far as possible to the purpose of an owner whose intention to transfer has been unequivocally manifested."[1] LECTURE III.

When possession is already with the donee it need not be renewed; no formal transfer therefore is necessary, when the gift is to a depositary, bailee or trustee who is already in possession of the property which forms the subject matter of the gift.[2] In the case of *Vilayet Hussain* v. *Maniran*,[3] the Calcutta High Court held, that when the subject of the gift has been in the hands of the donee as manager or agent of the donor, such possession by the donee was not sufficient to make it unnecessary to the validity of the gift that there should be actual or formal delivery of possession of the property. In this case the gift was made in death-illness. It is submitted

[1] In a case among Hindus, *Kalidas Mullick* v. *Kanhyalal Pundit*, I. L. R. 11 Cal. p. 121, the Privy Council had occasion to refer to the principle, which it is submitted ought to be carefully borne in mind in dealing with the subject of gifts among the Mahommedans. Dealing first with the question what interest is conveyed to the donee when the terms of the gift are indefinite, their Lordships said, " It appears to their Lordships that the indefinite words of a gift must be limited by the purpose of the gift, and that it was Romasunderi's intention that Ruttonmoni should take the property only for her life."

With reference to the validity or invalidity of the gift on the basis of non-possession, their Lordships used the following language :—" A gift where the donor supports it, the person who disputes it claiming adversely to both donor and donee is not invalid, for the mere reason that the donor has not delivered possession, and that where a donee or vendee is under the terms of the gift or sale entitled to possession, there is no reason why such gift or sale though not accompanied by possession, whether of moveable or immoveable property (where the gift or sale is not of such a nature as would make the giving effect to it to be contrary to public policy) should not operate to give the donee or vendee a right to obtain possession."

[2] Hed. III, 295. *Radd-ul-Muhtâr*, IV, p. 783.

[3] 5 Cal. L. R. 91.

 that the principle laid down by the learned Judges goes beyond the Mahommedan Law.

Section II.

GIFTS TO MINORS.

Gifts to minors.

In the case of a gift by a father to his minor child, no acceptance is necessary, "the gift is completed by the contract, and it makes no difference whether the subject of the gift is in his hands or in that of a depositary." If a father make a gift of something to his infant son, the infant, in virtue of the gift, becomes proprietor of the same, provided the thing given be at the time in the possession either of the father or of any person who stands in the position of a trustee for the father, because the possession of the father is tantamount to the possession of the infant by virtue of the gift, and the possession of the trustee is equivalent to that of the father. The same rule would apply to a gift by a mother to her infant child, whom she maintains and whose father is dead and there is no constituted guardian; and so also with respect to the gift of any other person maintaining a child under similar circumstances. "It is to be observed that the law with respect to seisin in cases of alms-gift is similar to to that in gifts. Thus, if a person should bestow in alms upon a pauper anything of which the pauper has possession at the time, he (the pauper) in that case becomes proprietor of the same without the necessity of a new seisin; and so also if a father should bestow in alms upon his infant son something of which he himself or his trustee has the possession, the infant becomes proprietor thereof—contrary to where the thing so bestowed has been pawned, lost by usurpation, or sold by an invalid sale."

"If a stranger make a gift of a thing to an infant, the gift is rendered complete by the seisin of the father of the infant; for, as he is master of deeds with respect to the child, liable to both good and evil (such as sale), he is consequently in a superior degree master of gift which is purely advantageous."

If a person make a gift of a thing to an orphan, and it be taken possession of in his behalf by his guardian, being either the executor appointed by his father, or his grandfather, or the executor appointed by his grandfather, it is valid, because all these persons have an authority over the orphan, as they stand in the place of his father.

If a fatherless child be under the charge of his mother, and she take possession of a gift made to him, it is valid, because she has an authority for the preservation of him and his property, "and the seisin of a gift made to him is in the nature of a preservation of himself since a child can not subsist without property." The same rule obtains with respect to the validity of the seisin of a non-relative who has the charge of an orphan, *viz.*, that where a gift is made to an orphan who is living in the guardianship of a stranger, if possession is taken by such guardian it would be sufficient in law.

If an infant endowed with understanding or discretion, should himself take possession of a thing given to him, it is valid, because such an act is to his advantage, and the law, therefore, presumes in him the capacity of performing it, as capacity depends on reason and understanding which he possesses.

It is lawful for a husband to take possession of a gift made to his wife if she is an infant, provided she has been sent from her father's house to his; and he is authorised to do so even though the father is living, because the father after sending the girl to her husband's

LECTURE III. house is held by implication to have resigned the management of her concerns to the husband. It is otherwise where she has not been sent from her father's house, because then the father is not supposed to have resigned the management of her concerns. It is also otherwise with respect to a mother or any other person having charge of her, because they are not entitled to possess themselves of a gift in her behalf, unless the father be dead, or absent, and his place of residence unknown; for their power is in virtue of necessity and not from any supposed authority, and this necessity cannot exist whilst the father is living. If a house be given to a minor child containing the effects of the father, the gift is valid.[1] And this principle applies equally to the gift of any other guardian. A *sadkah* to a minor child by the father whilst the father is living in it is valid according to Abû Yusuf and the *fatwa* is with him (that is, decisions are passed in accordance with his doctrine).

Things given in *jahâz* (by way of paraphernalia) to a bride taken to the house of the husband belong to her, unless the father says they were given by way of *ariat* (commodate loan,) the *onus* being on him to prove his statement; usage will have to be considered in connection with the position of the father.

A gift by the mother to her infant child of her dower-debt due by the father is valid, when the mother invests the child with the power to realise it, in other words, authorises him to recover the debt. As the donation of a gift implies an authority to recover it, the proviso may be regarded as a distinction without a difference.

The above principles may be formulated as follows:—

If a stranger make a gift to an infant, the right of ac-

[1] Fatâwa-i-Alamgiri, IV, p. 526.

[2] Radd-ul-Muhtar throughout.

ceptance and possession on behalf of the infant appertains in the first place to the father. If the father is dead, or is at such a distance as to preclude the possibility of his presence, in that case the executor of the father takes the place of the father. If there is no executor of the father, then comes the grandfather, and in his absence the grandfather's executor. Besides these, who may be regarded as guardians *de jure*, no other person can take possession of the subject-matter of a gift unless that person happens to be the *de facto* guardian of the infant, that is, the child is in his or her custody, and is being nurtured by him or her. Under the Shiah Law, only the father and grandfather or the constituted guardian can take possession of the subject of a gift for a minor.

If a child is being brought up by an uncle, and there is an executor of the father, the possession of the uncle is not sufficient unless it can be shown that the executor was unwilling to take possession of the gift for the child.

A mother's possession is valid and effectual when the child is in her custody, and there is no father or grandfather.

Musst. Banoo Bibi v. Fakhr-ooddeen Hassan.

If the child is in the custody of, and is being brought up by a stranger, the possession of the mother, brother or uncle is not valid, the possession of the stranger would be sufficient. In the case of *Musst. Banoo Bibi* v. *Fakhrooddeen Hassan*, however, the Sudder Court proceeded further and held a deed of gift by a female to a minor, whom she had received into her family as an adopted son, of property of which possession was not delivered at the time of the gift or during the lifetime of the donor, she having retained possession of it on behalf of the minor, to be valid and complete in law notwithstanding that the father of the minor was alive.[1]

[1] Sel. Reports, II, p. 180.

LECTURE III. If a minor girl is married and is living with her husband, a gift of which possession is taken by the father or the husband is equally good.

But before the minor wife has been sent to the husband's house, or after she has attained her majority, the husband is not entitled to take possession. The guardianship in respect of a minor wife vests in the husband when she comes to his house.[1] As long as she has not been sent to his house, he has no right to take possession on her behalf of any gift made to her; when she has come to live with him he becomes her *wali*.[2]

If the father is alive or present, but the child is being brought up by the uncle, grandfather or mother their possession is sufficient.

If the minor is possessed of understanding, he may take possession of the gift, and in order to prevent any dispute, the Kazi should appoint a curator for the same. When the donee is insane, the right to possession belongs to his guardian.

If a gift is made to a *latîk* (foundling), the possession of one who brings up the child, or that of the *hâkim* is sufficient.

An infant who has attained discretion has a right to reject as well as to accept.

It is lawful for parents in case of necessity, (and where it can be shown that it was the intention of the grantor that they should do so,) to make use of a gift made to the child but not to consume it.

Presents to children.

Presents given to a child at circumcision, if suited for him, become gifts to him. If not suited for him they become the property of the parents, according as they are

[1] The custody of a minor wife does not belong to the husband, *In re Khatija Bibi*, 5 B. L. R. p. 517, but it is not illegal, *In re Mahin Bibi*, 13 B. L. R. p. 160.

[2] See S. 14, Act XL of 1858.

made by the friends or relatives of the father or mother. But if the giver of the gift distinctly specifies at the time that the present is for the child, it is for him.

Presents given to a bride follow the same rule, that is, if they are made by the relations of the husband they become the husband's property, unless they are distinctly mentioned to be given to the wife.

Nobody can make a gift of his child's property even for a consideration. This is a natural corollary of the principle which debars guardians from selling the property of a minor, unless under exceptional circumstances.

A youth who has attained discretion but not puberty, may accept a gift even after his *wali* has rejected it.

In the *Fatáwa-i-Kazi Khan*, it is stated that if a person give a house to his minor child and subsequently purchase or acquire another house with the proceeds of the house of which gift has been made, this latter house will be the property of the child. According to the *Radd-ul-Muhtár* this is the accepted doctrine, though Imam Zufer apparently holds a different view. The doctrine, however, when analysed would seem to express in other words, the principle that when a gift has been made by a father to his child, it becomes the property of the minor though it continues to remain in the possession of the father. And accordingly any dealing with the property by the father *dehors* the right of the infant would not change the character of the gift or destroy the right of the infant.

It may, however, be that the gift was a fraudulent one and never intended to take effect, but this question cannot arise between the father and the child (the gift by parents to children being irrevocable among the Hanafis and Shiahs as will be shown afterwards). It can only be raised by creditors of the father, *whose debts were subsisting at the time of the gift*, to satisfy which such

Lecture III. property would have been liable, and who may show by the mode of dealing with the property subsequent to the gift, that it was fraudulent and a merely paper transaction intended to defeat their just claims.

Section III.

GIFTS WITH CONDITIONS.

Conditional gifts and gifts with conditions.

There is a great difference between *conditional gifts* and *gifts with conditions attached to them.* The former, like those which are made dependent for their operation upon the occurrence of certain contingencies, whatever their character, are void according to all the schools. Whilst with regard to gifts with conditions attached, there exists a certain divergence between the Shiahs and the Hanafis. According to the Hanafi Law any derogation from the completeness of the gift is null; and if the intention to give to the donee the entire subject matter of the gift be clear, subsequent conditions derogating from or limiting the extent of the right would be null and void.

Accordingly, under the Hanafi Law, *whilst the gift is valid the condition is void.* Under the Shiah Law, if the condition is subsidiary to the gift, both the gift and the condition are valid. For example, if a man were to say, "I give you the debt due to me by A, on condition that you give to B, the interest thereon;" under the Hanafi Law the condition is void, but the gift valid. Under the Shiah Law, if the gift depends on the condition attached, the entire gift is bad. If it does not and the condition is only subsidiary, then both the gift and the condition are valid. Gifts dependent upon certain contingencies are void according to both the schools. For example, a condition for the avoidance of a debt in words like the following: "When to-morrow comes and thou happenest

to die, then thou art discharged from my debt," is null and void. Or "shouldest thou die of this disease, this house is thine," in all these cases the gift is absolutely void. But a condition implying an immediate operation of the gift would be valid. For example, if a man were to say to another, "if you owe me any money, I absolve you of it", or "you will be absolved of my debt when I die[1]" (which becomes a legacy). LECTURE III.

If a man were to say to another, "that house is for thee; if thou diest before me it is mine, and if I die before thee it is thine," in the *Nawâdir* it is stated from Abû Hanifa, it is a *hiba*, the conditions being void. If a man were to say, "I have made this *rukba*[2] for thee" it is an *ariat*, that is, the donee shall have the loan of the thing without any disposing power over it, subject to the option of the donor to resume his gift or loan at any time. If a man were to say, "I have made this *rukba* for thee, and it is thine," it is a *hiba*. Under the Shiah Law every word which indicates the gift of proprietary rights is sufficient to constitute a *hiba*.[3]

A life-grant or *umra* under the Hanafi Law takes effect as a *hiba*, the condition limiting the gift being held void. A gift to A for life and remainder to B takes effect as an absolute gift to A,—to use an English expression, gives him an estate in fee.

A mere grant of the usufruct of a thing is in the eye of the law, simple *âriat* or commodate loan which implies on the part of the donee the obligation of returning the selfsame thing.[4]

[1] Fatâwa-i-Kazi Khan, IV, p. 229.

[2] *Ibid.*

[3] Jâma-ush-Shattât.

[4] "A mere grant of usufruct is an *ariat* in a thing which can be used without being destroyed, but things which must be consumed, in use imply gift except in the case of money." Fatawa-i-Kazi Khan, p. 230.

LECTURE III.

Limited estates under the Shiah Law.

The Shiah Law recognises the validity of limited estates and deals with the subject under a special chapter under the head of *al-hubs* and *as-sukna*.

Hubs signifies literally the tying up of property, technically it means grants limited to a certain time.

Hubs are acts by which the proprietor confers on another person "gratuitously," that is, without any consideration, the enjoyment of the use or usufruct of a thing with a reservation of the owner's right of property in it. The reciprocal consent of the contracting parties, expressed or implied, with transmutation of possession suffices to render the contract valid.

Temporary grants or limited estates under the Shiah Law.

Temporary grants or limited estates receive different names according to the object with which such grants are made or such estates are created.

"The enjoyment of the use or usufruct created for life," in other words a life-estate, is called *al-umra*.

The enjoyment of the use of a house without any right of property in it is called *as-sukna*, "right of habitation."

The enjoyment of the use or usufruct of a thing for a fixed and determinate period is called *ar-rukba*. This word literally signifies *servitude* and is applicable to the condition which derogates from the completeness of the gift and cuts down an absolute gift to a limited estate.

There is no special formula for effecting such a contract, but it may be made in the following words, such as, "I have granted to such a one the enjoyment of such a house or such a land for his life or for such a time," or in any other words which express the intention of the proprietor. The execution of the contract becomes obligatory after the delivery of the property. The contract by which the enjoyment and use of a house or habitation is conferred upon any one is put an end to by the death of the grantor.

When a grant is made in these terms, "when you die it will revert to me," the reversion would take effect by the death of the donee.

A grant by which the grantor conveys to the donee and "his successor" the enjoyment or use of some property, would confer only a life-estate, and the property will revert to the grantor upon the death of the grantee, as if the word "successor" had not been mentioned.

When the grant of the usufruct is made for a limited and determinate period of time, the contract becomes obligatory at the moment of the delivery of possession, and the proprietor cannot resume the subject-matter of the grant until after the expiration of the term fixed. A grant made for the lifetime of the donor does not terminate upon the death of the donee, the right passes to his heirs who enjoy the same until the death of the grantor.

A grant of the usufruct without determination of period might be revoked at any time at the will of the grantor.[1]

A limited estate or the grant of the usufruct of some property does not terminate by the sale of the *substance* of the thing; the grantee has the right of holding possession of the thing given and enjoying the usufruct until after the expiration of the term of the grant.

The right of *sukna* or habitation granted in general terms empowers the grantee to live in the house with his relatives and children; but he connot transfer the right to any other person unless there is a special condition to that effect.

[1] "Of every thing of which a *wakf* is valid, the *umra* or granting for life is valid also and the grant is not invalidated by the sale of the thing, for the purchaser must fulfil to the life-tenant whatever was conditioned on his behalf." Sharâya-ul-Islam, p. 246.

LECTURE III. The grantee cannot let or hire a house or mansion given to him for habitation without the special permission of the grantor.

All grants constituted in favour of determinate persons without specification of time terminate by the decease of the proprietor or grantor, and become a portion of his inheritance. Likewise all grants constituted for determinate periods of time terminate at the expiration of the period fixed and revert either to the grantor or his heirs.

Where a grant is to A, and his children, "generation after generation," or where a grant is made to A, with the addition of the usual expression which implies a perpetual descent in the grantee's line, *e. g.*, *naslan bâd nasl batnan bâd batn,* the grant conveys to the grantee an absolute estate, the terms used implying perpetuity of the grant. In fact, a grant to the donee and his descendants gives to the donee an estate in fee subject to no restraint of any kind upon alienation or otherwise.

Nasir Husain v. *Sughra Begum.*

In the case of *Nasir Husain* v. *Sughra Begum,*[1] it appeared that the plaintiff's father Zulfikar Husain executed on the 23rd of November 1868 a deed of gift, in respect of a certain house belonging to him, to his cousins Ali Muhammud Muzaffar Husain and the defendant Abdul Muzaffar, and by another deed of gift duly registered and executed on the 14th of December 1872 he assigned his proprietary right in the same house to the plaintiff Nasir Husain. The right of Ali Muhammud, one of the above-named transferees under the deed, dated the 23rd of November 1868 was attached in execution of a decree against him held by the defendant Sughra Begum. The plaintiff objected in the execution department, but as his objections were disallowed, he brought a suit to establish his right to the house in dispute and for a declaration

[1] I. L. R. 5 All. p. 505.

that on the death of Ali Muhammud all his right in the property ceased and terminated. The main point for determination in the case therefore was whether under the terms of the instrument of transfer, dated the 23rd of November 1868 the proprietary right in the house had passed to the transferees. The material portion of that instrument was as follows :— Lecture III.

"I have of my own accord and freewill given the house to my brothers Ali Muhammad Muzaffar Husain and Abul Muzaffar for their residence and that of their heirs, generation after generation. I or my heirs neither have nor shall have any claim regarding the house in question, but if the said brothers or their heirs attempt to sell or mortgage the house, I or my heirs shall have a claim to the house; so long as a sale or mortgage is not effected I or my heirs shall have no connection or concern with the house."

The Court of first instance held that the right of Ali Muhammad one of the donees was heritable and transferable, and dismissed the suit. The plaintiff appealed to the High Court contending *inter alia* that the parties to the suit being Shiahs were not governed by the texts of Mahommedan Law relied upon by the lower Court which were applicable to Sunnis.

The High Court of Allahabad in affirming the judgment of the first Court made the following remarks :—

"We are of opinion that the Subordinate Judge has come to a right conclusion in this case, and that the house, the subject of the suit, was taken by the defendants not merely for the purpose of residence but absolutely. The operative words in the deed of gift are very clear and strong." (After stating these words the learned judges continued as follows) :—"Now the meaning of such a conveyance is perfectly clear. The purpose and inducement of the gift of the house is residence but the gift itself in property is to the donees and "their heirs, generation after generation", and what follows is merely in the nature of recommendation, and has not in law the

Lecture III. effect of limiting the estate in the house itself. This is the construction of such an instrument under all systems of law, European or Indian. It is clearly conformable to the law of England, and the Subordinate Judge shows that it is in accordance with Mahommedan Law."

"It was argued at the hearing on behalf of the appellant that the parties in the present case are Shiahs, and that the text of the Mahommedan Law and of the other authorities referred to related to the more numerous Moslem sect, the Sunnis. The parties in the present case are undoubtedly Shiahs, and if their Imameea Law had contained any precept or provision inconsistent with the Sunni law referred to by the Subordinate Judge, it would have been our duty to have given effect to such a state of things. But the careful examination which we have given to the doctrines of the Imameea Code as expounded by Mr. Baillie, 1869, page 226 *et seq.*, has convinced us that there is no difference on this subject between the two systems of Mahommedan Law. In fact while the Sunni law is very distinct, the Shiah or Imameea Law is silent on the subject; the intention in the latter system evidently being the adoption and application of the Sunni rule to Shiahs,[1] where their own Imameea Law does not speak the only cases of gifts of this nature alluded to in the latter being gifts plainly limited to a life-interest."

"There is a passage in Baillie's Imameea Law, pp. 226—227, which if expressing undoubted Shiah doctrine perhaps deserves some notice. The passage is this:—If one should say "I have given this mansion to thee for life and to thy successor," it would only be an *umra* or for his own life, and there would be no transfer to the life-holder according to the most approved opinion, just as if he had

[1] There can be no doubt that this view is founded on a misapprehension of the Shiah Law.

not said "to thy successor." If such is the Imameea Law, it is difficult to understand and still more difficult to appreciate a limitation of interest which necessitates the striking out from the words of gift its distinctly expressed extension to a "successor." The author does not explain what he is pleased to call "the most approved opinion." It is at least a most arbitrary construction of the gift confessing as it appears to do that it could not stand if the terms "to thy successor" also remained part of the gift. In the present case, however, the estate given by the gift is conveyed in much larger terms giving the house to the donees "for their residence and that of their heirs, generation after generation, I or my heirs neither have nor shall have any claim regarding the house in question," words which if they are capable of any legal meaning clearly and distinctly bestow the right to the thing given absolutely." LECTURE III.

SECTION IV.

CONDITIONAL GIFTS.

If a person make a gift of a certain piece of land to another on condition that the donee should give to the donor the produce of such land for his support,—according to Abu'l Kasem if the land is capable of bearing produce, the gift is good and the condition void. But if the land is waste or unculturable the gift is bad (*fâsid*). Under the Shiah Law both *gift and condition* would be valid. Under the decision of the Privy Council in the case of *Nawab Amjad Ally Khan* v. *Mohamdi Begum*,[1] a gift of the *corpus* with the reservation of a life-interest in the proceeds of the property was held valid. Their Lordships

[1] 10 Moore's Ind. App. p. 510.

Lecture III. referring to the question under review said,—"It remains to be considered whether a real transfer of property by a donor in his life-time under the Mahommedan Law, reserving not the dominion over the *corpus* of the property nor any share of dominion over the *corpus*, but simply stipulating for and obtaining a right to the recurring produce during his lifetime is an incomplete gift by the Mahommedan Law. The text of the Hedâya seems to include the very proposition and to negative it. The thing to be returned is not identical but something different; see Hedâya; "Gifts" Vol. III, Book XXX, p. 294 where the objection being raised that a participation in the thing given invalidates a gift," the answer is, "The donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use (of the whole indivisible article) for his gift related to the substance of the article, not to the use of it. Again, if the agreement for the reservation of the interest to the father for his life be treated as a repugnant condition, repugnant to the whole enjoyment by the donee, here the Mahommedan Law defeats not the grant but the condition; Hedâya, "Gifts," Vol. III, Book XXX, p. 307. But as this arrangement between the father and the son is founded on a valid consideration, the son's undertaking is valid and could be enforced against him in the Courts of India as an agreement raising a trust and constituting a valid obligation to make a return of the proceeds during the time stipulated. The contention of the parties therefore is not found to violate any provision of the Hedâya, and the transfer is complete."

This decision may at first sight seem to be in conflict with the doctrine of the Hanafi Lawyer Abu'l Kasem, but it must be borne in mind that in the Hanafi Law

much of the voidableness of conditions arises from the character of the Arabic expressions. As a general rule, it may be stated that, when the intention to make an absolute gift is clear, any condition which derogates from the immediate completeness of the gift is regarded as void. In this view, the decision of their Lordships in the Privy Council seems to be in accordance with the Hanafi Law, the reservation of a life-interest in the income not preventing the property from vesting in the donee. LECTURE III.

The gift of a thing which has been lost "when recovered" is bad.[1] For example, if a man were to say to another, "I give thee the pearl which I have lost, recover it and take it." According to Abû Yusuf, this is a void gift, being the gift of a mere speculation. Zuffer, however, holds it to be valid.

If the gift is made with an option to the donee, it is valid if the option is exercised immediately at the same meeting, that is, before separation.

If the donor make a gift with an option to himself the gift is good and the option void.

According to Abû Hanifa, if a man make a *sadkah* (a charitable donation) of a house to his minor son and continue to reside in it without paying any hire, the donation is valid. So it is valid if it is inhabited by another person though without hire, the father being (presumed to be) in possession thereof for the son.[2]

A gift does not become void on account of an invalid condition. Accordingly, when an arrangement has been entered into between a husband and wife in regard to their respective rights, the consideration for such arrangement takes effect as a gift and does not become void for any invalid condition. "But sale, mortgage and lease," adds Kazi Khan, "would be void for invalid conditions."

[1] The principles that follow are taken from Kazi Khan.

[2] Kazi Khan, 236.

LECTURE III.

Where a man purchases a house and after obtaining possession thereof makes a gift of it, and if subsequent to the gift another person obtains possession of a moiety on the ground of pre-emption, the gift as to the remainder is invalidated.[1]

An acknowledgment of *hiba*.

An acknowledgment of *hiba* implies an acknowledgment that all the necessary formalities were complied with. If a man were to say, "I have made a gift of a certain property to Zaid," such acknowledgment will be effectual also as to possession.

If a man direct his partner to give his share of the partnership assets to his son, (but do not authorize the son to take possession of it), it would not take effect as a complete gift and the right of the father would remain in tact.

[1] This must be considered in connection with the question of limitation.

CHAPTER III.

THE REVOCATION OF GIFTS.

Section I.

Lecture IV.

Revocation.

Shâfeï and Mâliki Law.

Regarding the power of the donor to revoke gifts there is considerable divergence between the schools.

According to the Shâfeïs and Mâlikis, gifts (with the exception of those made by parents to their children) cannot be revoked, whether change of possession has taken place or not. This of course is independent of the ground of coercion or want of comprehension.

The parents, however, may revoke the gifts made by themselves to their children. But this right of revocation possessed by the father and mother is not absolute. When the gift is in the nature of a *sadkah*, (a grant or donation made with the object of securing happiness in a future life, or for deserving the reward of God,) the gift is irrevocable.

The father and mother are also precluded from revoking their donations to their children under the following circumstances:—

(1) When the subject-matter of the gift does not retain its original form, or has disappeared *in toto* or in part, or has been sold or exchanged; mere increase or decrease in the value from a fluctuation of the market does not come within this head.

(2) When the donor has contracted a marriage and that marriage has taken place in consideration of the thing given.

(3) When the donee has died and the property has passed to his heirs.

Lecture IV.

Shiah Law.

Gift to a stranger may be revoked at any time.

According to the Shiah Law, "after possession has been taken of a gift, it cannot be lawfully retracted when made in favour of parents (according to general consensus), nor even when the donee is any other relative by consanguinity of the donor, though there is some difference of opinion, which however is not approved." But if the gift be to a stranger, it may be revoked at any time so long as the substance of the thing given is in existence. After it has perished there can be no revocation. In like manner a gift cannot be revoked if anything has been received in exchange, though the exchange should be of little value. Mere use by the donee of the thing given is not sufficient to preclude the donor from revoking, unless in the use by the donee the subject of the given has changed its character substantially. The Mohakkik has stated in the Sharâya that it is abominable for a wife to revoke a gift made to her husband, and in a husband to revoke a gift made to his wife. An influential body of lawyers, among them the Shaikh, go further and hold that husband and wife stand in the same footing in respect of their mutual gifts as kindred by consanguinity, and that gifts by married people to each other are irrevocable. These Shiah lawyers are in accord with the Hanafis who, as will be seen afterwards, hold that the marriage relation prevents the revocation of gifts.

Law

According to the Hanafi Law, though the revocation of a gift is worthy of reprobation from a moral point of view, yet it is not illegal. The revocation of a gift, says the *Fatáwa-i-Alamgiri*, "is abominable under any circumstance but is valid nevertheless." The consequence of this principle is that in every instance a gift may be revoked before delivery of possession, but, after transmutation of possession has been effected, certain kinds of gifts cannot be revoked whilst the others may be

revoked under the decree of the judge or with the consent of the donee.

When a gift is made to a blood-relation within the prohibited degrees and delivery of possession has taken place, the donor has no right of revocation. In order to make a gift irrevocable, it will be seen that not only must it be to a blood-relation but such relation must be within the prohibited degrees. A gift to a cousin is not irrevocable, inasmuch as a cousin is not within the prohibited degrees. Similarly, a gift to the mother of one's wife is revocable as she, though within the prohibited degrees, is not a relation.

It has already been stated that, excepting in the case of gifts to such relations as are within the prohibited degrees, every other gift is revocable. Previous to delivery the donor can revoke the gift of his own motion either in whole or in part. After delivery, he must obtain either the consent of the donee or the decree of the judge to validate the revocation.

All the jurists are agreed in holding that a revocation under a judge's decree is a cancellation of the original gift, but there is some difference of opinion whether revocation by mutual consent is tantamount to cancellation. The tendency of precedents, however, is in favour of its being a cancellation also. Thus, when one person has given a thing to another who gives it to a third party and then revokes the gift, the power of revocation becomes revested in the first donor; but this would not be the case if the second donee was to return the thing to *his* donor by way of a gift; "for the second revocation being a cancellation, it follows that the thing given returns to the former state of property, and that the donor becomes again the proprietor without any necessity for taking possession anew." After revocation the sub-

LECTURE IV. ject of the gift constitutes an *amânut* or trust in the hands of the donee, so that if it should perish he is not responsible for the loss. But when the revocation is neither by a judge's decree nor by mutual consent, and the donee gives back the subject of the gift to the donor who accepts it, he does not again become the proprietor of it till he has taken possession. When the donor does obtain possession, the gift by the donee takes effect as a revocation by the judge's decree or by mutual consent, and the donee has no power to revoke it.

Abû Yusuf is reported to have held that, until an order has been passed by a judge for cancelling a gift, the donee may use and dispose of the subject of it, but any such use or disposal after the judge has made his order is unlawful; and the opinions of Abû Hanifa and Mohammed were to the same effect. If the subject of the gift should perish in the hands of the donee, after the passing of the Kazi's order and previous to the donor's retaking possession, the donee is not responsible for the loss, unless possession had been demanded of him and he had refused to give it. If, after a gift has been revoked, but before any decree of a judge, the donee should give the subject-matter of the gift to the donor who takes possession, it would take effect as a revocation by order of the judge.

Supposing the donor expressly foregoes the power of revocation, it still remains in tact and does not "drop." But if the right of revocation is compounded by the donor for something given to him by the donee, the composition is valid and the thing becomes an exchange which extinguishes the right of revocation.

The revocation must be effected in appropriate terms, such as, "I have revoked the gift," or "restored it to my own property," or "I have cancelled or dissolved it."

If without using any such expression, the donor con-

tracts to sell the subject-matter of the gift or to give it in pledge, such act would not amount to a revocation. And if the revocation is conditional it is ineffective. For example, if he should say, " I will revoke," or " this gift will stand revoked when such an event happens," or " on such a date," it would not be valid, because revocation can neither be suspended on a condition nor referred to a future time.[1]

Circumstances under which a gift is not revocable.

A gift is not revocable under the following circumstances :—

(1) When the subject matter of the gift has passed out of the possession of the donee by gift, sale, or any other form of alienation by which the right of property is transferred ;

(2) When the donee is dead and the subject-matter of the gift has devolved on his or her heirs ;

(3) When the donor is dead, that is, his heirs have not the power of revocation. The option of revocation is a personal right in the donor ;

(4) When the thing given is lost ;

(5) When the gift is for a consideration ;

(6) When the subject-matter of the gift has altered in substance in the possession of the donee ;

(7) When an increase or accretion has taken place in the thing given, and such increment or accretion is of such a nature as to be united with or inseparable from it. And it makes no difference in the irrevocability of the gift whether the increase be in consequence of an act of the donee or without such act, and whether it have issued from the thing itself (such as fruits on trees) or be an accession to it (such as accretion by growth). But it must be incorporated with or form part of the body of the subject-matter of the gift and imply an addition to or enhancement in its value. Dyeing, sewing, porterage &c,

[1] Fatâwa-i-Alamgiri, IV, p. 537.

LECTURE IV. are considered as causes which extinguish the power of revocation.

Mere transfer from one place to another, when it adds to the value and has occasioned expense, is sufficient to prevent revocation. A separate increase does not prevent the revocation of a gift nor any loss or damage sustained by the subject of the gift.

Marital relationship bars revocation.

8. When the donor and donee stand to each other in the marital relationship. But such a gift in order to be irrevocable must be made during the subsistence of the relationship. For example, a gift made prior to marriage may be revoked. But when a gift is made during marriage and the relationship is afterwards dissolved, the gift cannot be revoked. Difference in the creed of the married parties makes no difference in the irrevocable character of the gift.

9. Relationship of blood within the prohibited degrees is a bar to revocation, without any restriction as to the creed of the donor or the donee.[1]

10. The natural growth of the subject-matter of the gift also debars the donor from revoking.

Where the power of revocation exists, it may be exercised either with reference to the whole or a part.

[1] *E. g.*, Parents and grandparents how high soever and children and their descendants how low soever ; sisters and brothers and their descendants, paternal and maternal uncles and aunts ; Radd-ul-Muhtâr.

" If a person make a gift of anything to his relation within the prohibited degrees, it is not lawful for him to resume it ; Hedâya.

Relationship arising from fosterage or matrimony does not bar revocation ; *Khazânut-ul-Muftiin.*

Where an alien who has obtained the protection of a Moslem State, while living in the country of Islam, makes a gift to his Moslem brother, and then goes away leaving permission to the donee to take possession which is done, it is valid in law ; but if the gift was made by the Moslem to the alien brother, and he went to the *Dár-ul-Harb* before acceptance, the gift would become void, *Mabsût.* Where a gift is made to the mandatory of a brother, it cannot be revoked. And if the gift is rejected by the mandatory and accepted by the principal, it is valid, *Kinia.*

When a gift is revoked, the donor can exercise his proprietary rights and all its incidents from the time the subject of the gift comes into his possession; but he can give no antecedent effect to them. Thus, when a man has made a gift of a house and delivered it to the donee, and a house adjacent to it is sold, after which he revokes the gift, he has no right of pre-emption in regard to the second house.

When a debtor has been discharged from his liability, the creditor or donor has no power of revocation in regard to the debt so discharged.

Relationship arising from fosterage or affinity does not bar revocation.

Where one person makes to another the gift of a horse, and the donee has it trained, there is no power of revocation on the part of the donor, though Zuffer apparently differs. Approximate accompaniments acquired after the gift debar the right of revocation.[1]

The removal of the subject-matter of the gift from one place to another at expense or with labour bars revocation. If a man make a gift of clothes to another who has them washed by a washerman, the right is barred.

If a person make a gift of some dirhems to another, and then borrow them from the donee, the right of revocation is lost, the character of the subject being changed.

As revocation does not take effect without the decree of the judge or the donee's consent, if a person were to make a gift and deliver possession thereof to the donee, and after that were to take it back without the donee's consent or the order of a judge, and the thing be lost, the donor is liable for damages.

If a woman make a gift to her husband and then allege that it was extorted from her by force or threats, her claim should be received.[2]

[1] Kazi Khan.

[2] Probably when supported by *primâ facie* evidence.

LECTURE IV. When a gift is made simultaneously or jointly to a relative within the prohibited degrees and to a person not so related, the gift to the latter may be revoked.

A *sadkah* or gift by way of charity completed by possession cannot be revoked.

Before delivery of possession a gift may be revoked without the order of the Kazi or the consent of the donee.

If possession has been given to the donee, he is entitled to retain the gift and use its profits until the Kazi has made his order.

A gift to the poor and indigent is a *sadkah* or charity and not revocable.

If a person were to make a gift of a house to another, and the donee subsequently has it painted or plants trees in or about it or in any way alters it, the gift is irrevocable.

When a portion of the gift is destroyed, the remaining portion may be revoked.

When a gift is made to two *ghair-mahram*[1], the portion of any one of them may be revoked, the gift as to the other remaining good.

If a gift is made by two persons to one donee, any one of them may exercise the right of revocation in respect of his share without the consent of the other.

Express withdrawal of the power of revocation does not destroy it.

There is no power of revocation in the case of a gift of a debt to a debtor. The debt becomes satisfied or cancelled by the gift, and therefore does not exist to be revoked.

If a person make a gift to another of a piece of land, which is unoccupied at the time and destitute of buildings and plantations, and the donee plant trees or erect

[1] A relation not within the prohibited degrees.

buildings on it, the donor in that case is not entitled to revoke his gift. A small temporary erection, such as a shed, does not operate as a bar to revocation. Any actual and substantial improvement is sufficient to prevent the donor from exercising the right.

The acceptance by the donor of a consideration or *ewaz* is a bar to revocation; and though the *ewaz* for the gift may have been made by a third person voluntarily on behalf of the donee, its acceptance by the donor would deprive him of his right of revocation.

If the donee has given anything in exchange for the gift and a portion of the gift proves to be the property of some other person who recovers it from the donee, in that case the donee is entitled to receive from the donor a proportionate share of the exchange given by him. If, on the contrary, any portion of the consideration form the property of another person, the donor in such a case would not be entitled to resume a proportionate share of the gift, but he may return to the donee the remainder of the consideration or exchange in his hands and then resume his gift.

When a person revokes his gift either by virtue of a decree of the Kazi or by the consent of the donee, it is in effect a cancellation of the original gift and not a gift *de novo* on the part of the donee and therefore seisin by the donor is not in such a case, a requisite condition.

Revocation is lawful with respect to an undivided portion. If a revocation amounted to a gift *de novo* from the donee to the donor, seisin, say the Hanafi lawyers, would be a requisite condition, and consequently revocation with respect to an undivided portion would not be lawful.

Sadkah not revocable.

A gift by way of a charity or *sadkah* cannot be revoked. For the gift of charity is to obtain merit in the sight of God and that has been obtained by the gift. If a person bestow

LECTURE IV. something on a rich person by way of charity, it is not lawful to revoke the gift; because to acquire merit in the sight of God may sometimes be the object in bestowing alms upon the rich. "In the same manner also if a person make a gift of anything to a poor man without using the terms *sadkah* or charity, it would not be lawful on his part to revoke the gift."[1]

Its *raison d'être.* Any gift made with a view to recompense in future life is *sadkah* and irrevocable. A *sadkah* may be made in favour of any individual, rich or poor, a relation or stranger. The difference between *hiba* and *sadkah* consists in the object with which the donation is made, *viz.*, in the case of *hiba*, the desire is to increase the mutual affection of the parties or to evidence esteem,[2] in the case of *sadkah* the object is, as the Hedâya puts it, "to acquire merit in the sight of the Lord." Vows for alms-givings, when actually carried out, take effect as *sadkah* and are governed by the same rules. "Alms requires seisin of the subject of the gift. Like gift it is not valid unless attended by seisin, as it is gratuitous in the same manner as a gift. Neither is an alms lawful where it consists of an undivided part of a thing capable of division. Retractation of alms is not lawful; because the object in alms is merit in the sight of God, and that has been obtained. If also a person bestow alms upon a rich man, it is not lawful to retract therefrom on a favourable construction of the law, because to acquire merit in the sight of God may sometimes be the object in bestowing alms upon the rich. In the same manner also, if a person made a gift of anything to a poor man, it is not lawful to retract it because the object in such gift is merit and that has been obtained."

[1] I give the principles in substance as they occur, notwithstanding that some of them are repetitions of what has already been indicated.

[2] Mishkat, Kazi Khan; Sharâya-ul-Islam.

CHAPTER IV.

CONSIDERATION OR EWAZ.

Section I.

Lecture V.

Ewaz or consideration for a gift.

The consideration for a gift may either be stipulated for in the contract of the gift, or be subsequent to the donation.[1] With regard to a consideration given after the original gift has been made, it must be distinctly specified that the consideration is in lieu of the gift, and in the second place, the consideration should not form a portion of the subject-matter of the gift. If the consideration be a portion of the gift, it would not be valid and there would be no *ewaz*. But if such a change has taken place in the thing given, as would prevent revocation of the gift, part of it may be constituted a con-

[1] "Gift is of two kinds. It is either *unqualified* and void of any consideration, as, where the donor makes an absolute gift of property, in which case seisin of the property given is essential to the validity of the gift; or *qualified*, of which there are two descriptions, *first, Hiba-ba-Shart-ul-Ewaz*, which is accompanied by the expression of a condition and consists in a person offering to give to another something *on condition of his receiving from the donee something else.* In this case also seisin of the thing given is requisite, and it is also essential that it should be defined and separated from the rest of the donor's property. But this description of gift resembles a gift in the first stage only and sale in the last stage, that is, after the receipt of the consideration. Such a gift therefore unaccompanied by seisin cannot operate to prevent the devolution of the property, according to the Law of Inheritance, after the satisfaction of all prior claims on the estate, such as, debts, dower, legacies, &c. *Secondly, Hiba-bil-Ewaz*, which consists in a person saying to another "that he has given such a thing for such a thing, as, for this cloth, or for this slave, or for a thousand dirhems;" and this description of gift resembles a sale in both stages according to the universally received opinion, in which case the seisin of the donee is not an essential condition."

Macnaughten's Principles and Precedents, p. 220.

LECTURE V. sideration or *ewaz* for the remainder. If two things are given by two different contracts, one of them may be given in exchange for the other. It is also a condition that the consideration must be secured to the grantor. If the grantor has to make over the consideration to anybody else, then there is no exchange and the gift may be revoked. But if a portion of the *ewaz* becomes lost the the remainder is a good consideration for the entire gift.

[1] The text is according to Kazi Khan. The following is from Baillie according to the Alamgiri :—

"The *ewaz*, or exchange in gift, is of two kinds—one subsequent to the contract, the other stipulated for in it. With regard to that which is subsequent to the contract, the subject may be considered under two heads : first, the conditions under which the exchanging is lawful, and the second gift becomes the *ewaz*, or exchange for the first ; and second, the nature, or essential character of the exchanging. First, as to the conditions ; and these are three :—1stly, the *ewaz*, or exchange must be distinctly opposed to the prior gift by words clearly expressive of such opposition, as, for instance, by saying, 'This is the *ewaz*,' or 'the *budul*,' or 'in place of thy gift,' or 'I have made a donation of this for thy gift, or 'I have made it lawful to thee,' or 'established it to thee,' or words of similar import. So that if one should give a thing to another, and the donee should take possession, and then make a gift of something to the donor, without saying 'in *ewaz* of thy gift,' or using some other of the forms of expression above-mentioned, the second gift would not be an exchange for the first, but a new gift, and each of the parties would have the right to revoke. 2ndly, The *ewaz* in a contract of gift should not be something that comes into the possession of the donee by means of the contract itself. So that if the donee should give in exchange for the gift a part of the thing given, it would not be valid, and there will be no *ewaz*. *But if such a change should take place in the thing given as would prevent a revocation of the gift, part of it may be made an ewaz for the remainder.* And if two things are given by different contracts, and one of the two is given back as an exchange for the other, though there is some difference of opinion on the point, yet, according to Abû Hanifa and Mohammed, it would be a good *ewaz* ; and, if one of them were given by way of gift and the other a *sadkah*, and the *sadkah* were exchanged for the gift it would be an *ewaz*, according to them all. 3rd. The *ewaz* must be secured to the giver ; and if it be not secured to him, as for instance, if a right be established to it while in his hands, it is no *ewaz*, and he may revoke the previous gift if the thing given be still subsisting in kind, undestroyed and without any increase for the better, or anything happening in it to prevent revocation. If it should

"When the exchange takes place subsequently to the gift, the *ewaz* is, without any difference of opinion between 'our' masters, a gift *ab initio*. So that it is valid where the gift is valid, and void where the gift is void; there being no difference between them except as to the dropping of the power of revocation in the case of the *ewaz*, while it is established in that of the gift." "And after possession has been taken of the *ewaz*, the power to revoke drops also with respect to the gift. So that neither party can reclaim from the other what he has become possessed of, whether the *ewaz* were given by the donee or by a stranger, with or without his direction; so in the *Badáia*." "All the conditions of gift are applicable to the *ewaz;* and the transaction does not come within the meaning of a contract of *mudáwizat*, or mutual exchange, either in its inception or completion. Hence, it is not subject to *shufá*, or the right of pre-emption; nor can the thing given be rejected on either side on account of defect; so in the *Muhît-i-Sarakhsi*."

have perished, or been destroyed by the donee, he is not responsible any more than he would have been if such loss or destruction had taken place before the exchange. If a right be established to a part of the *ewaz*, the remainder is still an exchange for the whole gift; but the donor may, if he please, return what remains of the *ewaz* in his hands, and revoke the whole of his gift, if it be still in existence without any increase in its substance, and have not passed out of his property. As to the security of the thing given, that also is a condition of exchanging; so that if a right be established in it, the donee, under the original gift, may revoke the *ewaz*, and if the right be to a half, he may revoke half of the *ewaz*, when the thing given is of such a nature as to admit of partition; and it matters not whether the *ewaz* itself have increased or diminished in price or substance, he takes half the increase or the loss, as the case may be. This is when the subject of the gift, or the *ewaz*, is a thing that does not admit of partition, and the right is established in part of it; but when it admits of partition, and a right is established in part of one of them, the *ewaz* is void if the right be established in it; and in like manner, the gift is void if the right be established in it; and when the *ewaz* is void, the gift may be revoked, and when the gift is void, the *ewaz* may be revoked, Baillie's Digest, p. 542.

LECTURE V.

Hiba-ba-Shart ul-ewaz or gift with a condition of exchange.

"The second kind of *ewaz* is that which is *stipulated* for in *the contract of gift.* When a gift is made on condition of an *ewaz*, or exchange, all the conditions of gift attach to the *ewaz* in the beginning. So that it is not valid in *mushaá* of anything that admits of partition. Property is not established in it before possession; and each of the parties may refuse delivery. But after mutual possession has been taken, the effect is that of sale; and the donor cannot revoke his gift nor the donee the *ewaz*. *Shufâ*, or the right of pre-emption, is established by the transaction; and each of the parties may return the thing of which he took possession for any defect. According to *kyás* (analogy), however, a gift on condition of an exchange ought to be a sale in its inception as well as in its completion; so in *Fatáwa-i-Kazi Khan*. When a man gives a mansion to two men on condition of an *ewaz*, or exchange of a thousand dirhems, the *transaction becomes a lawful sale after mutual possession;* so in *Kinia*."

Hiba-bil-ewaz not revocable.

"If a person should give an *ewaz* for the whole of a gift, it would prevent revocation, whatever the amount of the consideration may be; if the *ewaz* be for a part of the gift, the part for which there is no *ewaz* may be revoked, but not that part for which the *ewaz* was given; *Sharh-i-Tahtáwi*." "An *ewaz* made by a stranger is lawful, whether by the direction of the donee or not; and the stranger giving the *ewaz* cannot have recourse to the donee, whether it was by his direction or not, unless the donee have said, 'Make an *ewaz* to such an one on my account on condition of my being responsible,' which would be the same as if he should say, 'Give this thy slave to such an one from me,' when the person directed would have no recourse against the person who gave the direction, unless he had said, 'on condition of my being responsible.'

The general principle in cases of this kind is, that when anything is demandable of a person in specie, and is obligatory upon him, his direction to another to pay it is a cause of recourse against himself without any condition of responsibility, and that when a thing is not demandable from a person in specie and is not obligatory on him, his direction to another to pay it is not a cause of recourse against him, unless his responsibility is made a condition of the payment, as is stated in *Fatáwa-i-Kazi Khan*."

If the father of an infant were to grant to another by way of a gift some property belonging to his child and receive from that person something in exchange, he may revoke the gift, or the donee may revoke his consideration at any time they like. And when a person has given something to a minor, and his father makes an *ewaz* for it out of the minor's property, the exchange is not lawful though the gift were made on condition of an *ewaz*.[1] Where a man suffering from an illness to which he eventually succumbs, makes to another a gift of property of the value of a thousand dirhems, having no other property besides, and the donee gives an *ewaz* for the gift, of which the donor takes possession and then dies, the *ewaz* being in his possession at the time of his death, if the *ewaz* be equal in value to two-thirds or more of the property given, the gift is valid, but if the *ewaz* be less than two-thirds of the value thereof, the heirs would be entitled to recover from the donee the difference between the value of the two-thirds of the subject-matter of the gift and the actual value of the exchange. For example, if the *ewaz* was only worth 500 dirhems, the

[1] The reason of both the above principles is apparent; the father having no right to deal with the property of the minor, except for certain purposes.

LECTURE V. heirs of the donor will be entitled from the donee to one-sixth of 1000 dirhems, "though the *ewaz* were stipulated for in the original gift." The donee, however, may if he please return the whole gift taking back his *ewaz*, or restore a sixth of the gift and keep the remainder.

The following examples taken from the *Fatáwa-i-Kazi Khan* will not be without value on this subject.

"Anything given in exchange for a gift bars revocation. Nor can the gift of an *ewaz* be revoked; it must be clear, however, that the consideration was given in exchange for the gift.

"Any person other than the donee, whether with or without the consent of the donee, may give an *ewaz* for a gift, thus destroying the right of the donor to revoke the gift, that is, if he has accepted the consideration.

"If the consideration is given by a person other than the donee, he may revoke the same unless the donee has made a bargain with such person that the consideration would be paid back to him.

"Even should there be any defect found by the donor in the thing given by way of an exchange he cannot revoke his gift.

"When a gift is made to two people and one of them gives an *ewaz* for the share given to him, the donor may revoke as to the other share.

"If a gift is made to a minor, and the father or his executors give an *ewaz* out of the property of the minor, such grant is not valid and consequently the donor can revoke."

"If a person set up a claim to an *ewaz* and recover the same, the donor can revoke, but if he recover only a portion and there remain yet a portion thereof in the hands of the donor, he cannot revoke, for the smallest consideration is sufficient to destroy the power of revocation."

"If the subject-matter of the gift is recovered by another person legally entitled to it, the donee may recover the whole of the *ewaz*; if a portion only is recovered by the rightful claimant, the donee can recover only a proportionate share of his *ewaz*."

"If the donee convert a portion of the gift into another substance and give it in exchange it would be a good *ewaz*. If a person make a gift of one thousand dirhems to A. who gives in exchange out of the same one dirhem this is not a good *ewaz* according to "us," though Zuffer differs."

"If a Christian make a gift to a Moslem and the latter give in exchange any prohibited article the exchange is not good."

Where a gift is made by a minor to A who gives an exchange, the gift is null and inoperative nor does the *ewaz* vest in the minor.

Hiba-bil-ewaz.

A *hiba-bil-ewaz* in a sale in all its legal incidents. In sale, mutual seisin is not requisite to render the contract valid, and the terms in which a contract of this kind is entered into imply, that the articles opposed to each other are present, and that there is no danger of either party suffering from the other's fraud. "I have given you this for that," implies that the consideration is present, and that the person will take care to receive it before parting with his property, and the law therefore annexes to it the quality of a sale both with regard to the condition and the effect.

Suppose, for example, a person in making a gift expressed himself to this effect, that he had made a gift to and conferred upon another the proprietory right in his entire property in exchange of something given by the donee,—this is not a gift in consideration of an exchange, to be prospectively given, but it is a contract of mutual

LECTURE V. transfer or sale[1] both as to the condition and the effect. In such a case, seisin is declared not to be a requisite condition.

Hiba-ba-shart-ul-ewaz.

A *hiba-ba-shart-ul-ewaz* is a contract of a different description. The terms used in the constitution of such a *hiba* imply a contingency. Thus :—"I have given you this on condition of your giving me such a thing." Now, it will be observed that in this contract, its legal operation depends upon the fulfilment of the condition, being the delivery and seisin of the *ewaz* or consideration ; otherwise, if it were valid and binding without such condition, the consideration might be withheld, and it might thereby become as it were a *nudum pactum*. As to the effect, this contract is declared to have the property of a sale, that is to say, after mutual delivery of seisin it becomes in effect a sale.

For example, if a person were to declare that he had made a gift to, and conferred on another the proprietary right to his entire property on condition that the donee should give to him something in exchange for the gift, and the donee were to accept the condition, it would be a gift *ba-shart-ul-ewaz or a gift on condition of an exchange*. Technically, as regards the *shart*, it is considered in the light of a gift, and sale as to the effect. Seisin is requisite to its validity and the gift cannot be said to be established until the parties shall have delivered seisin to each other, but the property conferred remains as formerly at the disposal of the donor. He is therefore at liberty to make a subsequent disposition of it.

The following examples from the *Sharh-i-Chalpi* and other authorities will explain these principles further :—

[1] Sale is defined thus in the Transfer of Property Act :—"Sale is a transfer of ownership, in exchange for a price paid or promised, or part paid and part promised."

"I have given to you this slave for this garment of yours or for one thousand dirhems; to which proposal the person addressed assents; this is a *hiba-bil-ewaz* both as regards the condition and the effect; so also in the *Sharh-i-Vikâya*." "A contract of sale is established by conferring a right to one thing in lieu of another; so in the Hedâya." "The expressions, I have given you this for that, or take it for so much, have the same signification as the terms, I have sold or purchased from you; so also in the Vikâya." "Where *these* exist the sale is complete." "By these are meant declaration and acceptance, and when these are found to exist, the sale is binding from which it follows that seisin is not a condition, and where these do not exist the sale is not binding. In the Vikâya it is stated that a gift on stipulation is a gift as regards the condition and therefore seisin is requisite; and is moreover stated to be a sale as regards the effect. In the Sharh-i-Vikâya, a definition is afforded of what constitutes a gift on stipulation, as if one man should say to another, 'I have given you this thing on the condition of your giving me that.' It is also laid down in the Hedâya, that in all cases of contract of gift on stipulation, mutual seisin of each of the articles exchanged is necessary."[1]

The effect of a *Shart* (condition) attached to a gift.

In the Bakâli it is stated from Abû Yusuf that if a man were to tell another, "this thing is for thee if though likest," and make it over to him, and the person addressed reply, "I like" or "accept,"—the condition (*shart*) is good. So also it is reported from Mohammed, if a date tree begins to bear fruit and the owner of the tree says to another, "these dates are for thee, if they get ripe", or "if to-morrow comes," it is lawful. But if he were to say, "these dates will be thine, if Zaid enters his house," it will not be valid.

[1] Comp. Macnaughten's Principles and Precedents, p. 229.

LECTURE V.

Gift and release do not admit of the option of stipulation.

When a gift is made subject to a condition that the donee shall have an option for three days within which to accept or reject, the gift is valid if the acceptance is expressed before the separation of the parties; but if not accepted by him till after they have separated, it is not lawful. But when a gift is made on a condition that the donor shall have an option for three days, the gift is valid, and the option void; "because gift is not a binding contract, and therefore does not admit of the option of stipulation." "When a person says to another, 'I have released thee from my right against thee, on condition that I have an option,' the release is lawful, and the option void."

Distinction between a conditional gift and a gift with a condition.

"A man to whom a thousand *dirhems* are due by another, says to him, 'When to-morrow comes the thousand is thine'; or 'thou art free from it,' or 'when thou hast paid one-half the property then thou art free from the remaining half,' or 'the remaining half is thine,' the gift is void. But if he should say, 'I have released you on condition that you emancipate your slave,' or 'Thou art released on condition of thy emancipating him by my releasing thee,' and he should say, 'I have accepted,' or 'have emancipated him,' he would be released from the debt."

"All our Masters agree in holding that when a gift is made, and a vitiating condition is attached to it, the gift in that case would be valid and the condition void. For example, if a person were to give something to another and stipulate that he should not sell it, the gift would be valid, and the condition void; *Sirâj-ul-Wahâj*. It is a general rule with regard to contracts, in which seisin is necessary, such as *hiba* and *rahn* (pledge) that a condition *dehors* the absoluteness of the contract, would not void the contract, but drop itself. So in the *Siraj-ul-Wahâj*.

A marriage cannot be dependant on a condition. LECTURE V.

"A woman says to her sick husband, "if you die of this sickness, you are released from my dower, or my dower is on you as *sadkah* or alms,"—this is void because it is contingent and a suspension, so in the *Zahiria*. A sick woman says to her husband, "if I die of this my disease, my dower is to thee as alms," or "you are released of my dower," and she does die of the disease the gift is void, and the dower remains due by the husband, so in the *Khazânut-ul-Muftiin*. When a woman is desirous that a husband who has repudiated her should marry her again, and the husband says, "I will not marry you till you give me what is due to you by me," and she gives her dower stipulating that he will marry her. The dower remains a debt against him whether he marry her or not, because she has made the property due to herself an exchange for marriage, and in marriage no exchange is incumbent on a wife; *Kazi Khan*. When a man says to his debtor, "if you do not pay me what you owe me till you die, you are released," it is void; *Bahr-ur-Râik*. But if he should say, "when I die, thou art released," it would be lawful; *Kazi Khan*. While if he say, "if I die, then thou art free from this," there is no release, for this is contingent. Similarly if he were to say, "if thou enterest the house, thou art free from what I have against thee." A man releases another from his debt that he may settle an important matter for him with the Sultan—he is not released, for this is a bribe; so in *Kinia*."

Examples of contingent gift.

SECTION II.

GIFT OF A DEBT.[1]

"The gift of a debt to a debtor," says the Alamgiri, "is valid both according to *kiyâs* and law; and to any person

The gift of a debt.

[1] From the Alamgiri, Gift of a debt, Vol. IV, p. 535.

LECTURE V. other than the debtor, it would be valid according to law, when he is authorized to take possession of it; so in the *Tatâr-Khâniah*."

"The gift of a debt to a debtor, which is a discharge, is complete without his acceptance; but if he rejects it, it does not take effect, this is according to all the *Mashâikh*, the received doctrine; *Jawâhir-ul-Akhlâti*. The above principle is applicable to a case where the debt is not cash. If it is, then it is dependent upon the debtor's acceptance. If he accepts it, he is discharged; but if he does not, he remains liable. This is not the case with other debts, which are discharged whether the debtor accepts the release or not; but with reference to those also, the gift is open to rejection."

With reference to a *hiba* and a discharge of a debt to the surety, the principle stands thus:—a *hiba* of the debt to him is not valid without his acceptance, and would be liable to a reversal on rejection; but a discharge is valid without acceptance and would not be reversed on rejection.

"If a *hiba* is made of a debt to the debtor who dies before rejecting the gift, he would (nevertheless) be discharged. Similarly, if the *hiba* is made or discharge is given after the debtor's death, it is lawful. But his heirs may reject it, and the debt would be paid; this is according to Abû Yusuf. Mohammed differs and holds that there would be no liability; *Zakhîra*."

"If the creditor discharges the debtor, and he accepts, then both he and the surety are discharged. But neither he nor the surety would be discharged if he should not accept; *Khulâsa*."

"If a man dies indebted to another, and the creditor makes a *hiba* of the debt to the debtor's heirs, it is lawful; Kazi Khan."

"If the gift is to some of the heirs, it will enure to the benefit of all the heirs." Lecture V.

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"One of the heirs of a creditor gives his share in a debt to the debtor before partition, and in the deceased's estate there are both money and goods, the gift is valid in law, like a composition.[1] But Abû Hanifa has said when the gift is by a creditor of a property not capable of division, it is valid whether made to an heir of the debtor or to any other person, but when it is susceptible of partition, it would not be valid; so in *Kinia*."

"When the gift of a debt is validly made to a debtor, he is entitled to recover from the creditor any *mâl* which he held for the debt; so in *Tatâr Khâniah*."

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"A creditor makes a gift of his debt to his debtor, who neither accepts nor rejects it at the meeting, and then comes after the lapse of some days and rejects the gift; there is some difference of opinion on the point, but the sound doctrine is that the gift is not reversed."

"When a debt is due to two persons, and one of them gives his share to the debtor, the gift is valid. When a person who is in debt gives property to his creditor, the creditor becomes the proprietor of it by virtue of the gift, not of the debt."

Contingent gift of a debt

If a man were to say to his debtor "when to-morrow comes, or if thou diest, or if I die, thou wilt be discharged from my debt," this is invalid.

[1] There occurs the following passage in the *Alamgiri* as taken from the *Tatâr-Khâniah*:—The gift of a debt to the infant son of the debtor is not valid:

This doctrine is utterly without authority and founded upon a reason, *viz.*, the inability to take possession, which does not exist. It does not occur in any other work and the *Majma-ul-anhar* doubts its authenticity.

Lecture V.

A gift, however, upon a condition which is immediately fulfilled is not invalid; for example, if a man were to say to another, "if thou owest me any debt, I absolve thee from it;" such a gift would be valid if the debt was existing at the time. So also if he were to say "when I die, thou wilt be discharged from my debt," it will be valid, the discharge taking effect as a bequest, as is stated in Kazi Khan.

The gift of a debt to the debtor and his discharge from the liability takes effect without his acceptance, for the discharge of a debt is equivalent to its cancellation and therefore acceptance and possession on the part of the donee are not necessary.

The gift of a debt to a person other than the debtor is valid under the following circumstances:—[1]

(*a*) When it is made by way of *hawâlat*, that is the person to whom the assignment is made is constituted an agent for the creditor;[2]

(*b*) When it is bequeathed by way of a legacy;

(*c*) When the assignee is placed in a position to recover the debt.

A condition for an exchange is valid if the subject of the exchange is specific and not *majhûl* (unknown).[3] If a woman absolve her husband from her dower-debt upon any condition which is afterwards infringed by him, the liability would re-attach and he would continue liable for such debt. For example, if a woman were to say to her husband, "I absolve you from my debt on condition that you do not marry another woman," and he accept the discharge and subsequently take a second wife, he will continue liable for the dower of the first wife.

If a man were to say to his debtor "that if I do not

[1] Hed. III, p. 309.

[2] Hed. II, p. 606.

[3] Radd-al-Muhtar, IV, p. 779.

demand my debt from you until my death, it is yours," this is invalid.

A gift of a debt cannot be retracted if the debtor has once consented to the discharge.

When there are two creditors and one debtor, any one of them may discharge the debtor in respect of his share of the debt, or to use the phraseology of the Mahommedan lawyers, may make a gift of his share of the debt to the debtor.

Gifts by parents to their children.

A father may in health give his entire property to any one of his children.[1] It would be sinful, but if the gift is not invalid or void for other reasons, it will be legal.[2]

"A gift by a father of a house in which he lives or has his property is good according to Abû Yusuf and the *Fatwa* is according to him.[3]"

If a father makes clothes for his infant son with the express intention that it was for the child, he cannot give the clothes to another.

Gift by a wife of her dower.

A gift of dower[4] obtained by the husband by force or misrepresentation is invalid, *i. e.*, where a husband by

[1] From Kazi Khan.

[2] Durrul Mukhtar; see also Macnaghten, p. 227.

[3] Comp. here the Sharh-i-Vikâya; "If a father make a gift of something to his infant son, the infant in virtue of the gift becomes proprietor of the same. The same rule holds when a mother gives something to her infant son, whom she maintains and whose father is dead and no guardian is provided and so also with respect to the gift of any other person maintaining a child under these circumstances. If a stranger make a gift of a thing to an infant, the gift is rendered complete by the seisin of the father of the infant. If a person make a gift of a thing to an orphan and it be seised on his behalf by his guardian, being either the executor appointed by his father or his grandfather, it is valid. If a fatherless child be under charge of his mother, and she take possession of a gift made to him, it is valid. The same rule holds with respect to a stranger who has the charge of an orphan. If an infant should himself take possession of a thing given to him it is valid provided he be endowed with reason."

[4] From Kazi Khan.

LECTURE V. force or misrepresentation induces his wife to release him from the dower-debt, such release or discharge is not valid.[1]

In the *Bahr-ur-Râik* it is laid down, that a person to whom there are debts outstanding, can lawfully make them over by gift to another who is not 'indebted to him,' directing the donee to realize such debts, and take them for his own use—and such gift is valid. And in the Kazi Khan, as a consequence of the above principle, it is stated, that "a woman is entitled to convey her dower-debt to her infant child, and the child would be entitled to claim the same from the father on attaining majority. Similarly a married woman has the power to compound her dower-debt with her husband and accept in lieu thereof anything else." In this country a conveyance between the married parties by which the husband conveys some property to his wife in satisfaction of her dower-debt is called a *bye mukâsa.*

"If a woman compromise her dower for anything which has not been seen by her before delivery, and she subsequently become aware that it is defective, she is entitled to repudiate the contract and her right to the dower remains intact."[2]

"A woman may release her dower to her deceased husband," that is, the widow is entitled to exonerate or discharge the estate of her deceased husband from the liability for her dower-debt.

"When a woman makes a gift of her dower on certain conditions, which are not fulfilled, the gift is null. For example, if the dower-debt is released in consideration of the husband taking her on a *haj*, or not treating her with cruelty, or not preventing her visiting her relations,

[1] See *Moonshee Buzlur Rahim* v. *Shumsunnissa Begum*, 11 Moo. I. A. p. 551.

[2] Kazi Khan.

and the condition or conditions are not fulfilled, there is no abandonment of the dower."[1] LECTURE V.

"When a woman makes a gift of her dower on condition of the husband giving her something in return every year, and the husband fails to fulfil his part of the agreement, the gift fails also, for the gift in this case is a *heba-ba-shart-ul-ewaz,* that is an executory gift which is not completed and rendered perfect until the condition as to the *ewaz* is performed. And consequently when the *ewaz* is not obtained the gift fails."

"A woman makes a gift of her dower on the condition that her husband divorces her, and the husband accepts the gift subject to the condition, but does not divorce her, he is not absolved from the dower-debt."

"When a sick woman has given her dower to her husband, the gift is valid if she recovers from her illness, and even though she should die of that illness, yet if it were not a death-illness the answer would be the same, but if it were a death-illness the gift would not be valid without the sanction of the heirs."

Life grants or *Umras.*

The grant of an estate for life to A. with remainder to his heirs takes effect under the Hanafi Law as an absolute devise to the first donee. He acquires the same rights over the subject of the gift as if it was given absolutely to him.

Under the Shiah Law as well as the Shâfeï and Mâliki Law, where the grant is limited to the life of the donee, it reverts upon his death to the grantor or his heirs. A gift by way of a *rukba* is invalid according to all the schools, being a gift dependant on a contingency of a nature both uncertain, and involving as it were a wager on one's life. A *Rukba* is constituted by a person declaring "If I die before thee, this house of mine is thine, if thou diest before me it is mine."

[1] Radd-ul-Muhtar, throughout.

A *rukba* in the possession of the grantee amounts to an *ariat* or commodate loan returnable to the grantee whenever he likes.

If a person is the proprietor of a building as well as of the land upon which it is situated, he may make a gift of the building without the land and it will be valid.[1]

[1] Radd-ul-Muhtar, IV, p. 780.

CHAPTER V.

THE SHIAH LAW RELATING TO *HIBA* OR GIFTS.

Section I.

The Shiah doctrines have been sufficiently indicated in the preceding pages. It may, nevertheless, be useful to give a summary of the general principles in a consolidated form. Lecture V. Continued.

The principle feature of difference between the Shiah and the Hanafi schools on the subject of gifts consists in the rule relating to *mushaá*.

The Shiahs do not recognise the objection to a gift on the ground of the subject-matter being divisible and confused.

In contradistinction to the Hanafis, they recognise the lawfulness of limited estates.

A grant to A. limited to his life, is valid, the subject-matter of the gift reverting to the donor or his heirs upon A.'s decease, so also a grant to A., and after him to another person distinctly indicated and actually existing, will take effect as giving a life-estate to A. and after him a life-estate to the other person after which the property would revert to the donor or his heirs. But a grant to A. and his successor would only give a life-estate to A. as "his successor" is a person not distinctly indicated. A gift to A. and his *auládd* or *furzundán,* children generally or to his children, *naslan bád nasl, batnan bád batn,* "generation after generation and line after line," will

convey to A. an estate in fee, the words "children after children, generation after generation" being words of description and not of limitation.

The Shiahs also differ from the Hanafis with respect to the possession of properties given to minors. The Hanafis hold that the possession of any person in whose protection the infant is living, is sufficient; whereas the Shiahs, so far as the Mohakkik's views are concerned, insist that possession should be taken on behalf of a minor by a person legally authorised to do so or by the judge. Substantially, the rule amounts to this, that whereas under the Hanafi doctrines, the possession of a guardian *de facto* is sufficient,—under the Shiah law, possession must be taken by a guardian *de jure*. This does not, however, affect the case where possession has been obtained and held on behalf of a minor, by a person other than the father or the grandfather (or their executors,) who are the only guardians *de jure*. Where such has been the case, the court will not allow the gift to a minor to be invalidated.[1]

There is also considerable divergence between the Shiahs and Hanafis on the subject of *ewaz* and the legal incidents of a *shart* (condition) attached to a gift.

Section II.[2]

Gift is defined to be an act by which one person transfers to another *gratuitously without the intention of pleasing God*, accompanied by immediate transfer, the entire and absolute possession of a certain thing. A present (*an-nahila*,) and the simple gift (*al-atîa*) also constitute a gift, *viz. hiba*.

[1] This point was considered in an unreported case decided by Mitter and Maclean, JJ.

[2] The following principles are taken from the Sharâya.

The reciprocal consent of the parties and the delivery of the object into the hands of the donee suffice to validate a gift. LECTURE V.

There is no particular formula prescribed for the purpose of constituting a gift. If the act or declaration of the donor unequivocally explains his intention it is sufficient. Thus the following formula: "I have given," "I have made a present," "I have yielded the full proprietorship of such an object to such a person," may each be used for the constitution of a gift.

The donor and the donee must be of age, *compos mentis* and capable of contracting.

The gift of a debt is only valid if made in favour of the debtor[1] and constitutes a gratuitous release. The difference between a gift and a gratuitous release lies in this that according to the generally-received doctrine the consent of the debtor is not indispensable to the discharge of a debt.

A gift is not valid so long as the object given has not been handed over to the donee, in other words, possession has been transferred, either actually or constructively.

The validity of a gift is established if the donor declares that he has made the gift, and has delivered the thing to the donee, even if the object in question were at that moment in the possession of the donor.

After the gift has been constituted by the declaration of the donor and transmutation of possession has taken place, a revocation is not permitted.

If the donor die after the deed has been concluded but before the object given has been placed in the hands of

[1] I have sufficiently pointed out the divergence among the Shiah jurists themselves on this point; and that according to *urf* (custom) the gift of a debt to a person other than the debtor is valid even among Shiahs, see *ante* p. 102.

the donee, the gift is null and void and the object of the gift forms a portion of the heritage.

The donee cannot possess himself of the object given without the consent of the donor.

If the thing given is in the hands of the donee at the time of the contract no further seisin is necessary.

This rule is equally applicable to a case, where the thing given having remained in the hands of the donee for a space of time sufficiently long to justify the donor to protest, he has not done so. This is the opinion of certain jurists,

A gift made in favour of a minor by his father or grandfather is valid; these persons being qualified to constitute a gift and receive it in the name of the infant donee.

In all cases where the donor is not the father or ancestor of the infant donee, whether such donor be the guardian of the donee or not, the acceptance of the gift must be made by a third person in the name of the minor. This third person may be the guardian, *if not himself the donor.* Where the guardian himself is the donor, the possession of some person appointed by the judge would be sufficient.[1]

A *mushaâ* may form the subject of a gift, and the delivery is effected as in the case of sale. Where a gift is made to two different donees, they do not become conjoint possessors; each becomes proprietor of the part that is given to him, when both have accepted the gift. Where the acceptance is by one of the donees only, the gift is valid with regard to him but inoperative as regards the one who refused.

A father may validly give preference to one or more of his children over the others by making a gift, but such gift constitutes an act from which it is recommended to abstain.

[1] See, however, *ante* p. 157.

A gift made to the direct ascendants in the first degree of the donor and accepted by them is irrevocable. Lecture V.

The irrevocability of a gift made to relations other than the father and the mother is likewise admitted though there is some difference.

A gift made to a stranger is revocable while the thing which constitutes the gift is in existence.

Where the object given has perished the gift cannot be revoked.

A gift is also irrevocable, if the subject-matter of the gift has been sold for whatever price, or otherwise alienated by the donee.

In this latter case, the irrevocability is contested but it is preferable to admit it.

Gifts to relatives is specially recommended, particularly to the direct descendants, or to the father and mother of the donor; so is equal distribution among the children.

Married couples must reciprocally refrain from revoking any gift made by one in favour of the other.[1] Some jurists hold that in this respect married couples are like relations by consanguinity, but it is preferable to follow the former opinion.

Section III.

ESPECIAL PROVISIONS.

A sale by the donor of the subject-matter of the gift, after transfer of possession has taken place (expressly or constructively,) is null, if the donee be a relative by consanguinity. Similarly if the donee be a stranger (*i. e.*, not

[1] This is according to the Mohakkik. The Shaikh's view seems, however, more conformable to right reasoning.

LECTURE V. a relative by consanguinity,) if he had given anything in exchange for the gift.

In the case of a gift to a stranger, where possession has been transferred, but for which no exchange has been given, the sale is null, because the donor has sold a thing of which he was not the proprietor at the time of sale. According to some jurists, this sale remains valid, the donor having in this case the right of revoking the gift; but the former opinion seems more correct.

Sale by the donor of the thing given remains valid if the gift is annulled by illegality.

The principle of the two preceding articles is applicable to a sale by an expectant heir of property belonging to his ancestor, whom he believes to be alive, for the sale would be valid if it should appear that the ancestor was actually dead at the time.

A gift is constituted from the time of the seisin or transfer and not from the date of the contract, that is all the legal incidents, the rights and obligations arising from the gift accrue from the date when the donee takes possession of the thing given.

This is contrary to the case of a bequest, the right to which accrues to the legatee at the moment of the testator's decease though the transfer may take place afterwards.

In case of a contest between the contracting parties, the donor purporting to have in fact constituted the gift but alleging that he has not delivered it, his declaration will be accepted, but if the donee affirm that the object was legally delivered to him the donor will have to establish his statement by proof, *lit.* his oath.

So also if a person were to say "I gave him and made him the proprietor of it," and then deny having delivered possession. For it is possible that he may have made the

second statement (*i. e.*, "made him the proprietor of it") by way of re-affirmance of the first, (*i. e.*, "I gave it to him,") and may not mean to imply actual transfer.

In case of a revocation no indemnity is due to the donor, if the object constituting the gift has suffered any injury.

In case of revocation, if the thing given has attained in itself any increase in integral value, this augmentation accrues to the donor.[1]

When the increase or accretion after the gift can be separated from the original subject of the gift, it belongs to the donee, but any accretion before the seisin of the donee is the right of the donor in case of revocation.

A gift made without any reserve is always presumed to be made gratuitously.[2]

Should the donee on his side give anything to the donor, the gift would be irrevocable.

A gift made on condition that the donee should make some present or offer some gratuity or service to the donor is valid; the gift will be revocable only if the donee do not fulfil the condition imposed.

Where the present or gratuity which the donee must give, or the benefit which he must render, is not definite, he is free to fix it according to his own wish, and the acceptance by the donor of such present or gratuity from the donee makes the gift irrevocable.

The donee in the cases mentioned in the preceding articles cannot be compelled to give the present which has been fixed upon; he has the right to refuse it, but then the donor preserves the faculty of revoking the gift.

[1] Baillie translates this passage as follows :—"If the gift has increased and the increase is of such a nature as to be insisted to the original it belongs to the donor."

[2] "When a person has made a gift in general terms, there is no condition or obligation on the part of the *donee* to give any gratuity in return;" Baillie.

If in the preceding case the refusal of the donee has caused the revocation of the gift, he is not held responsible for the destruction or the depreciation of the object given; for he has disposed of a thing, the proprietorship of which has been legally transferred to him. This point is contested.

There is some difference of opinion regarding the power of revocation possessed by the donor in the case of a gift of a piece of cloth, which subsequently to the gift has been dyed by the donee.

Those lawyers who hold that the use by the donee of the subject-matter of the gift debars the right of revocation are of opinion that the dyeing of the cloth puts an end to that right; others, who do not hold that view, think dyeing not to be an impediment to revocation, but that the donee only becomes entitled to the value of the dye and to retain a lien over the cloth for such value.

A gift made during a serious illness is valid if the donor recovers; if he dies it is valid only with the consent of the heirs, and if they refuse, it is valid only to the extent of one-third of his estate.

CHAPTER VI.

THE LAW OF GIFTS ACCORDING TO THE SHÂFEÏ DOCTRINES.[1]

LECTURE V. Continued.

A gratuitous transfer of property is called a gift, when such a transfer is made with the object of receiving reward in another world, or of testifying respect for the donee. The condition, essential to the validity of a gift is, that there should be an offer on the part of the donor and acceptance on the part of the donee which must be express, though in the case of a present, it is not necessary that the offer or acceptance should be express; it is sufficient if the object is brought by the donor, and the donee takes possession thereof. A gift may be consituted by the use of the following expressions: "I wish you to inhabit this house of mine, and after your death it will go to your heirs;" "I wish you to inhabit it;" (this is according to the doctrine embraced by Shâfeï in his second period,) or finally by saying "after your death it will revert to me." On the subject of the validity of a gift made in the following terms, Shâfeï held a different view in his second period from those he entertained before; "I grant you the usufruct of this house for life," or "I make a gift of it to you for life, that is to say, in case of your predecease, it will revert to me, and in case of my predecease, it shall be irrevocably yours." However in our time both opinions of the Imam are equally in force in our doctrine, and whilst some regard such gifts as valid,

[1] The following principles are taken from the *Minhâj-ut-talibin.*

LECTURE V. others hold them invalid. Anything which may form the subject of sale or barter may form the subject of gift; but every object not subject to sale such as a thing usurped or unknown, or an animal that has escaped is not capable of being made a gift. The gift of a debt involves the remission of a debt, if it is made to the debtor, but it is invalid if made to a third person.

As for the proprietorship of the object given it is only transferred when the donee takes actual possession of the subject of the gift, with the donor's consent. When one of the parties dies between the making of the gift and the taking of possession, his heirs are placed in his position. Nevertheless some jurists have admitted that under such circumstances, the gift should be revoked.

It is laid down by the traditions that parents, provided they are not notoriously bad characters, have the power to divide their property equally among their children by donations *inter vivos* without distinction of sex, though others hold that they should not thus destroy the effect of the rule relating to succession.

A father has the right of revoking a gift made by him to his children, provided the donee has not irrecoverably disposed of the object received. So also other ascendants with respect to gifts made to grandchildren and their descendants. But where the donee makes a disposition which leaves the right of proprietorship intact, like mortgage, conditional gift (at least so long as possession has not passed,) conditional enfranchisement, or even according to our doctrines, a contract of lease the right of revocation is not lost. In case the donee should have lost the proprietorship of the object beforehand and should recover it subsequently, the right of revocation is not revived, and if in the meanwhile there has been an accretion to the subject of the gift the revocation can only take effect

if the increment has become incorporated with the object, but not where the increment exists separately. A revocation may be made in the following terms: "I revoke my gift" or "I reclaim the object," or "I wish the object to become my property again," or "I wish to break my gift," but it cannot be made impliedly by a subsequent disposition of the thing given, such as by sale, wakf, gift, to another person or enfranchisement.

If a gift is made with the express stipulation that there should be no consideration, the right of revocation is not accorded to any one but the ascendants, whereas a gift with no such stipulation is supposed to have been made without hope of consideration if the donee is in any way inferior in social position to the donor, and even if he is superior. Our doctrine goes still further; it accepts the same principle if the two persons are quite equal. Where a consideration is obligatory but has not been settled at the time of the contract, it must be of the value of the thing given; and under these circumstances the donor has the right to revoke the gift if the donee neglects to pay the consideration.

The validity of a gift made on condition of a fixed consideration is permitted; the gift must, however, be considered like a sale; but according to our doctrine a gift made on the especial condition of an unfixed consideration is null and void.

In the case of a present made to somebody, the thing in which it is delivered is considered as part of the present, and where it is customary need not be returned, *e. g.*, the basket that contains dates is not returned. Otherwise the package remains in the hands of the donor, and the donee can make no other use of it than in using it (for that specific purpose); for example, a dish for eatables presented provided that custom admits of such use.

CHAPTER VII.

THE LAW RELATING TO *WAKF* OR TRUSTS.

Section I.

Lecture VI.

The doctrine of trusts in the Mahommedan system.

The doctrine of trusts has been recognized and enforced in the Mahommedan system from the earliest times. Historically its origin is traced to the Prophet.

In one of the traditions handed down from the Prophet it is reported that Omar, who afterwards became the second Caliph of Islam, expressed to the Lawgiver his desire of dedicating in perpetuity for the benefit of the poor, a certain property which belonged to him and sought his advice as to the mode in which he should make it inalienable for all time. The Prophet replied, "tie up the property and dedicate the income."[1] From this small but important precept has sprung the enormous body of law relating to the subject of appropriations and settlements.

Trusts in the Mahommedan system are called *wakfs*, and may for the sake of convenience be divided under three heads, *viz.*, public, *quasi*-public and private. As a matter of fact, the Mahommedan Law recognizes only two classes of wakfs, *public* and *private*, and draws a sharp line of distinction between them. Wakf, for *masâlih-i-âmma*, *viz.*, for public works of utility or charitable purposes are regarded as public wakfs. All other trusts are treated as private. Of course there is no specific designation for private trusts. But all wakfs are treated in one category, in exclusion of the wakfs for *masâlih-i-âmma*. Consider-

[1] Hed. II. (Ar.), p. 888.

ing, however, that there is a large body of trusts which without being public trusts, partakes something of that character, I have thought it expedient to include them under the head of *quasi*-public wakf. LECTURE VI.

By *quasi*-public wakf, therefore, I mean those trusts, the primary and initial object of which is, partly, to provide for religious or pious purposes, and, partly, for the benefit of particular individuals or class of individuals.

By private wakfs, I mean those settlements the primary object of which is to make a provision for the settlor's family or relations.

Wakafa literally means "I have bound up or detained" and is applied to the tying up of animals, such as, a horse or camel.[1] Technically or as the Arabian jurists put it, "in the language of the law", it signifies the consecration of property for any charitable or religious object or to secure any benefit to human beings. To use the curt but expressive language of the Moslem lawyers a "dedication to any good purpose [*wujúh-ul-birr-wal-ihsán* of the Shiahs, or *wujúh-ul-khair* of the Hanafis][2] is a *wakf*. The terms *birr* and *khair* include all good and pious acts and objects. To make a provision for one's self is regarded by Hanafi lawyers as an act of *khair*, for the Prophet declared a man giving a subsistence to himself is giving alms,[3] and settlements upon one's family are approved of and regarded as lawful by all the schools. The best definition of the word *wakf* has been supplied by the Law Officers of the *Sudder Dewanny Adawlut*, who were consulted in the case of *Mohammed Sadik* v. *Mahommed Ali* and others.[4] They stated that *wakf* according to the opinion of Abú Yusuf and Mohammed, (which on this

Mohammed Sadik v. *Mohammed Ali* & others.

[1] Hed. II, (Ar.), p. 887.
[2] Hed. II, (Ar.), p. 888.
[3] Hed. II, (Ar.), p. 891.
[4] Sel. Rep. I, p. 17.

LECTURE VI. point is adopted as law,) implies *the relinquishment of the proprietary right in any article of property such as lands, tenements and the rest,*[1] *and consecrating it in such manner to the service of God that it may be of benefit to men, provided always that the thing appropriated be at the time of appropriation the property of the appropriator.*"[2] I shall have occasion to discuss this definition at a later stage of this lecture, but it may be mentioned that for all practical purposes the definition here given covers the meaning attached to the expression.

SECTION II.

There is considerable divergence between the various schools regarding the mode of creating a *wakf*, the objects in whose favour it may be created, and other cognate matters. Even within the Hanafi school itself, there is great conflict of views which deserves especial attention. For example, nothing can be more divergent than the opinions of Abû Yusuf and his fellow disciple on the one hand, and those of Abû Hanifa on the other on the nature and legal incidents attaching to a *wakf*.

According to Abû Hanifa, the legal meaning of *wakf* is the detention of a specific thing in the ownership of the wâkif or appropriator, and the devoting of its profits in charity on the poor or other good objects[3] in the manner of an *ariat* or commodate loan,[4] but not being absolute

[1] *Waghira*, this does not mean such like things but other objects.

[2] *Ibid.* p. 18.

[3] و التصدق بالمنفعة على الفقرا او على وجه من وجوه الخير

[4] Hed. II, (Ar.) p. 887. *Ariat* is resumable at the will of the lender. Mr. Baillie's note on this subject is worth inserting here.

"This does not mean that the profits are merely to be lent; but that the objects of the *wakf* are to have the same benefit from it as if the subject of it were lent to them in the manner of an *ariat*, when they would

in its nature it is revocable by the wákif, and he is at liberty to dispose of it according to his own will.

According to the two disciples, Abû Yusuf and Mohammed, whose opinions are binding on the sect, and is regarded as the correct law on this subject throughout the Hanafi world,[1] *wakf* is the detention of a thing in the implied ownership of Almighty God, in such a manner that its profits may be applied for the benefit of human beings, and the appropriation, (when once made,) is absolute, so that the thing appropriated can neither be sold, nor given, nor inherited.

The Fatâwa-i-Alamgiri states this principle thus :—" The appropriation becomes absolute according to Abû Yusuf[2] by the mere declaration of the wâkif that he has constituted or constitutes any particular property as *wakf*. The right of the appropriator becomes extinguished according to Abû Hanifa as soon as the judge has pronounced his decree. The mode in which such a decree may be obtained is for the appropriator to deliver the subject of the *wakf* to the *mutwalli* or superintendent, and then to require it back from him on the ground that the appropriation was not obligatory; whereupon the judge may pronounce his decree, that it shall be obligatory and it becomes so accordingly.[3] If the appropriator suspends the *wakf* on his death by saying, " When I die I have appropriated my mansion to such purpose " it is valid and

have the use of it, or in other words, its profits or usufruct for their own benefit so long as it remained in their possession." Baillie's Dig. 2nd Ed. p. 557.

[1] In the *Ayûn* and *Yutuma* it is declared that the Fatwa is in accordance with the opinion of the two disciples. Fatâwa-i-Alamgiri II, p. 454. Hed. II, (Ar.) p. 888.

[2] In Fulton, p. 345, the learned Judges distinctly said that according to the modern doctrine of Mahommedan decisions and lawyers, Abû Yusuf's opinion on this point is considered better law.

[3] *Kâfi*.

LECTURE VI. obligatory to the extent of a third of his property, the excess (if any) being in abeyance till it is seen if there is any other property. If the heirs do not allow the appropriation, the produce must then be divided into three parts, and one-third set apart for the *wakf* and the other two-thirds for the heirs. If the suspension on death be made during death-illness the effect is the same as if it were made in health."[1]

According to Mohammed, the right of the appropriator does not cease until the appointment of a *mutwalli* or curator and the delivery of the property into his hands.

As before remarked, the Hanafi jurists of Eastern Asia, following the example set by the schoolmen of Balkh, have invariably adopted the views of Abû Yusuf, and that is the case also in Algeria, Egypt and Northern Africa[2] and Turkey generally. In some places, however, in Central Asia where the influence of the Bokhariot schoolmen has left its mark, the views of Mohammed are recognized as law.[3]

According to Abû Yusuf the appropriator may validly appoint himself *mutwalli* and reserve to himself the power of exchanging the specific property which forms the subject-matter of the appropriation. Mohammed differs also on this point, but the opinion of Abû Yusuf is recognized as law,[4] and has been followed by the Supreme Court of Calcutta in the case referred to already.

According to the Mâlikis and the Shiahs, the consignment of the property to a *mutwalli* is a necessary condi-

[1] *Tahâwi.*

[2] Sautayra, p. 410, Art. 945.

[3] This is the explanation of the passage in the Fatâwa-i-Alamgiri, "the opinions of the learned seem to be nearly balanced between these two authorities declaring that the Fatwa is with Abû Yusuf, while two more allege that it is with Mohammed." It is a mistake to suppose that decisions are both ways, as Baillie puts it.

[4] Baillie, p. 559.

tion to impress upen the appropriation the stamp of a *bonâ fide wakf*. The Shiah law is thus stated in the *Sharâya-ul-Islam* :[1] "the contract of *wakf* is not rendered absolute except by giving possession." The law thus barely stated might seem to imply that by the *ikbâz* or consignment required under the Mâliki and Shiah law to impart absoluteness to a *wakf*, actual transfer or delivery of possession from the appropriator to a curator was intended. But this is not so; what is intended is simply a specific change in the character of the possession or the nature of the dominion, effected actually or constructively. For example, under the Shiah, as well as the Mâliki law, the appropriator may validly appoint himself as the curator or trustee. His possession of the trust property not as proprietor but as trustee or curator will not invalidate the *wakf*. LECTURE VI.

SECTION III.

THE CONSTITUTION OF *WAKF*.

Before proceeding further with the legal incidents which are attached to a *wakf*, it would be proper to consider how and under what circumstances an estate of the character contemplated under the Mahommedan Law under the term *wakf* is constituted. It may, at the very outset of this enquiry, be stated that there is no essential formality or the use of any express phrase requisite for the constitution of a *wakf*. This question which, owing to some difficulty in comprehending the exact meaning of certain dicta in Mahommedan law books, was involved in some doubt, was settled in the case of *Jewan Dass Sahoo* v. *Shah Kubeerood-deen*.[2] In that case, the *Jewan Dass Sahoo v. Shah Kubeerood-deen.*

[1] Sharâya-ul-Islam.

[2] Moore's Ind. App. 2, p. 390.

LECTURE VI. grant or firman[1] by which the endowments were created contained no mention of the word *wakf*. On the contrary the grants purported to be made as '*Inam Altamgha*,' which primarily convey individual proprietory rights. And it was accordingly contended on behalf of the defendant that the properties which formed the subject of the grant did not constitute an inalienable *wakf*. Their Lordships in the Privy Council in dealing with the case endorsed the views of the *Sudder Dewanny Adawlut*[2] in the following terms :—

Mussumut Qadira v. Shah Kubeer-ood-deen.

"After referring to this case and the opinions of the law officers, the *Sudder Dewanny Adawlut* in the case of *Mussumut Qadira* v. *Shah Kubeer-ood-deen* (3 Mac. Dew. Ad. 407) appear to have determined that notwithstanding the use of the words "Inam" and "Altumgha" in the royal grants and the mention therein of the persons upon whose petition the grants were made, yet as these grants appeared clearly to have been made (as expressed in the petitions) for the purpose of maintaining a charitable institution, the persons named were not to be con-

[1] The firman of Alamgir ran as follows :—

"As it has come to the knowledge of His Majesty that agreeably to a sunnud furnished by the Hakims, certain mouzas situate in Sircar Behar have been appropriated for the purpose of meeting the charges of fakirs and students of the Madrissa and the *Khankah* and Musjid of Moolla Dervish Hossain, son of Mulla Gholam Ali, and the aforesaid individual is hopeful for the royal munificence and favour, His Majesty's royal commands are that in the event of the aforesaid mouzas being in the occupation and enjoyment of that individual, the whole of these mouzahs shall continue as they formerly were at jumma of 15,000 dams from (such a date) in the character of a *maddadmash* (aid for subsistence,) according to the tenor of the grant, and in order that he may apply the produce of these lands to meet the charges of the students of his Madrissa and Musjid; and the present and future Hakims, the Amils &c. are enjoined to relinquish the mouzas in question to that person's occupation, to deem them *maaf* (exempt from taxes) and blotted with the pen in every respect, and not to require of him a fresh sunnud annually. Should that individual occupy anything in any other way they are not to countenance him."

[2] *Musst. Qadira* v. *Shah Kubeerood-deen ;* Sel. Rep. III, p. 407.

sidered proprietors; that the establishment (Khankah) was the real donee and the persons named were only Mutwallis of the Khankah; that a Mutwalli has no right to alienate, and that consequently the transfer by gift or otherwise by Shah Shums-oo-deen was illegal."

"This decision," their Lordships continued, "is in accordance with the doctrine laid down in the Hedâyah, Book XV, of wak for appropriation, Hamilton's Translation, Vol. II, page 334, where it is said, wakf in its primitive sense means 'detention;' in the language of the law, (according to Hanifa,) it signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall continue, and the advantage of it go to some charitable purpose in the manner of a loan. According to the two disciples, 'wakf' signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to his creatures. The two disciples, therefore, hold appropriation to be absolute, though differing in this, that Abû Yusuf holds appropriation to be absolute from the moment of its execution, whereas Mohammed holds it to be absolute only on the delivery of it to a Mutwalli, (or procurator,) and consequently that it cannot be disposed of by a gift or sale. Thus the term wakf in its literal sense com-

[1] A khankah is a religious monastery, a place where religious services are held, *dervishes* lodged, indigent travellers fed. It will be seen that the original grantee was a *mulla* or priest, and the grant was apparently made to him not only for his support and the support of his descendants, but also with the object of maintaining in perpetuity an institution for the lodgment of religious devotees, travellers and mendicants. In Western Asia, these Khankahs are called *rubâts*, and are used generally for housing pilgrims, dervishes &c. In India, *khankahs* are very frequent. And among other religious ceremonies, it is usual to hold in them the ceremony of saints.

LECTURE VI. prehends all that is mentioned both by Hanifa and by the two disciples."

"Again," (page 344) it is said, "upon an appropriation becoming valid or absolute, the sale or transfer of the thing appropriated is unlawful according to all lawyers; the transfer is unlawful because of a saying of the Prophet, 'Bestow the actual land itself in charity in such a manner that it shall no longer be saleable or inheritable.'" And their Lordships accordingly held, that "according to the Mahommedan Law, it is not necessary in order to constitute a *wakf* endowment to religious and charitable uses that the term *wakf* be used in the grant, if from the general nature of the grant such tenure can be inferred." It is with the light of this judgment, which is perfectly conformable to the general Mahommedan Law, that the following *dicta* must be read.

"Wakf or appropriation is effected by the expression of the word *wakf* (detention or appropriation) combined with that of *sadkah* or charity, or the expression of the word *wakf* alone is sufficient for the purpose."

"When a person has said—'This my land is a *sadkah* or charity freed and perpetual during my life and after my death,' or 'This my land is a *sadkah* appropriated, detained and perpetual[1] during my life and after my death,' or 'This my land is a *sadkah*, detained and perpetual during my life and after my death,' the land becomes a *wakf* lawful and obligatory for the benefit of the poor according to all opinions.[2] And if he should say 'a *sadkah* appropriated and perpetual,' it would be lawful

[1] موقوفة محبوسة مؤبدة

Muhboosatan from *habasa*, means literally detained; its exact signification however, is "being rendered inalienable;" *Moukoof* is the participle to *wakafa*.

[2] Alamgiri after the *Mabsût*.

according to the generality of "our" learned men,[1] or if he should say 'a *sadkah* appropriated,' or 'a *sadkah* detained,'[2] without saying 'perpetual,' the land would become a *wakf* according[3] to all who consider appropriation lawful, because a perpetual *sadkah* is established which does not admit of cancellation. The words 'This my land is a *sadkah* appropriated to what is good,' or 'to good purposes'[4] also amount to a *wakf*."

Hamidulla Khan v. Budrunissa Khatun.

The view therefore taken in the case of *Mahomed Hamidulla Khan* v. *Budrunissa Khatun*[5] seems to have been founded on an imperfect apprehension of the Mahommedan Law. In that case, the settlement was made in the following terms :—

"I have made *wakf* of the remaining 4 annas in favour of my daughter Budrunissa and her descendants, and also her descendant's descendants how low soever, and when they no longer exist then in favour of the poor and needy; such *wakf* is good, legal, valid and effectual and of the nature of a lasting permanent act of charitable endowment, the same being as good in my lifetime as after my demise and the same being precluded from *tumulluk* and *tamlik*. After payment of the Government Revenue and Collector's charges, &c., and after deduction of the Mutwalli's *towliut* right from the proceeds of all the above endowment properties the surplus, whatever it may be, shall be divided as follows :—*i. e.*, 4 annas' share be given to

[1] *i. e.*, excepting Mohammed, who insists on the necessity of *taslim* and Abû Hanifa, who holds that in such a case the right of the wâkif continues, the produce being devoted during the lifetime of the wâkif, to the purpose for which the dedication is made and the property falling into his inheritance after his death ; Fatâwa-i-Alamgiri, II, p. 460.

[2] صدقة محبوسة

[3] علي قول عامة من يجيز الوقف

[4] علي وجه البر او علي وجه الخير او وجوه الخير او وجوه الخير والبر

[5] 8, Cal. L. R. p. 164.

LECTURE VI. Jamila Khatun *alias* Dhone Bibee and 4 annas to Budrun-nissa, inasmuch as 4 annas has been endowed in favour of the said ladies, &c."

So far as the constitution of the dedication went, nothing could be more distinct and explicit than the declarations contained in the above *wakfnamah;* the grantor expressly excluded all rights of dominion over the property settled, which was intended to serve as a permanent provision for Budr-un-nissa and her descendants as long as there were any in existence; and on their failure, he provided that the benefit of the *wakf* should accrue to the poor and indigent. It will be seen that the terms of the settlement were in strict conformity with the provisions of the Mahommedan Law.

Upon a suit by Mahomed Hamidulla Khan to set aside a sale of a portion of the dedicated property in execution of a decree, on the ground that it was *wakf* and consequently inalienable, the High Court held, (1) that to constitute a valid *wakf* there must be a dedication of the property *solely* to the worship of God or to religious or charitable purposes; (2) that when a settlement under the Mahommedan Law is made in favour of a particular person and his descendants in perpetuity, and on their failure in favour of the poor and needy, such settlement is only valid as a "*wakf*," when the word *sadkah* is used in the deed of settlement. As regards the first point, the Calcutta High Court was probably misled by the decision in the case of *Abdul Gane Hassan* v. *Hussen Miya Rahimtullah.* That case was decided by the Bombay High Court upon reasons not founded entirely on a consideration of the Mahommedan Law. The English doctrine against perpetuity, which has no place in the Islamic system and is utterly opposed to the principle of the law of *wakf*, furnished the

[1] 10 Bom. H. C. R. 10.

basis of the decision in *Abdul Ganne Kasam* v. *Hussen Miya Rahimtullah*. It is submitted that the views put forward in that case and in *Mahommed Hamidulla Khan* v. *Budrunissa Khatun* proceeded upon a narrow comprehension of the Mahommedan Law of *wakf*. A mere reference to the text books is sufficient to dispose of the point. And one of the learned judges who decided *Mahommed Hamidulla Khan* v. *Budrunnissa Khatun*, had reason to modify his views in a later case.[1]

As regards the second point, and the necessity for the use of the term *sadkah*, where it is intended to create a settlement for one's family or descendants, the question would be set at rest by reference to the express dictum of the law.

"Though no mention be made of *sadkah*, yet if *wakf* is mentioned as by a person saying, 'This my land is *wakf*,' or, 'I have made this my land *wakf*,' the land would be a *wakf* for the poor according to Abû Yusuf." (This only in case the beneficiaries are not mentioned.) "And Sudr-ush-Shahîd and the jurists (*mashâikh*) of Balkh have declared that 'Decrees are given on the opinion of Abû Yusuf and *we*[2] decree according to it, *also from regard to custom*.'" The passage which I have italicised is most important and its significance will be perceived as I proceed to develop this branch of my subject. But what follows should be carefully noted. "And if he should say, 'it is appropriated to Almighty God for ever,' it would be lawful though the word *sadkah* be not mentioned and would be a *wakf* for the poor.[3] The word *wakf* alone or in combination with *hubs*, establishes a *wakf* according to the approved opinion, which is that of Abû Yusuf.[4] If one should say, 'I have made this my land con-

[1] *Luchmiput Singh* v. *Shah Amir Alum*, 12 Cal. L. R. p. 22.

[2] *i. e.*, the Jurists of India. [3] Fatâwa-i-Kazi Khan, see Vol. III, p. 73.

[4] و ذكر الوقف وحده او الحبس معه يثبت به الوقف علي ما هو المختار و هو قول ابي يوسف رح — غيائيه

LECTURE VI. secrated' or 'it is consecrated,[1]' that would be the same in the opinion of Abû Yusuf, according to Abû Jâfar, as if he had said appropriated.[2] And if he were to say 'appropriated, consecrated and detained,' or, 'appropriated, detained and consecrated not to be sold, inherited or given by gift,' all these words would create a *wakf* according to the received doctrine and the opinion of Abû Yusuf. And the Fakîh Abû Jâfar says that 'detained and given in charity' is equivalent to saying 'given in charity and appropriated.' If a person should say, 'This my land is appropriated for such an one,' or 'on my son,' or 'the poor of my kindred being good persons,' or 'orphans,' 'and the appropriation of it is not to be reversed,' it would be no *wakf* according to Mohammed, because it is for a purpose that may be cut off or fail and is not perpetual, but it would be a *wakf* according to Abû Yusuf because the making of it perpetual is not a condition with him.[3] If one should say, 'My land or my mansion is a *sadkah moukoofa* (appropriated charity) for such an one,' or 'the children of such an one,' they would be entitled to the produce while they lived and after their decease it would go to the poor. If one should say, 'My land is *sadkah* (charity) for God,' or 'appropriated to Almighty God,' it would become *wakf*.[4] So also if he were to say, 'my land is appropriated in the way of Almighty God,' or 'to seek the reward of Almighty God;' or of he were to say, 'My land is appropriated for a good purpose,' it would be as lawful as if he had said a *sadkah* (charity) appropriated.[5]"

"When a person has said, 'This my land is for a way,' and he is in a city where such expressions are commonly known to imply *wakf*, the land becomes *wakf*. If the

[1] *Muharrama*, Baillie's puts this word as meaning "prohibited."

[2] Kazi Khan. [3] *Muhit-i-Sarakhsi*. [4] *Ibid*. [5] *Zahîria*.

expressions are not known to have that meaning, he shall be called on to explain; and if he say that he meant *wakf*, they are to be applied according to his intention. If he say that he meant *sadkah*, or had no particular meaning, they are to be taken as a vow, and the land or its price should be given in charity.[1]" * * * * * * "A man says in sickness, 'Buy out of the produce of this my mansion every month ten dirhems' worth of bread, and distribute it among the poor,'" the mansion becomes *wakf*. "If he should say, 'I have appropriated after my death' or 'I bequeath that it may be appropriated after my death' it would be a valid *wakf* out of the third of his estate."

* * * * * "And if a man were to say, '*Sadkah* not to be sold,' it would be a vow of charity, not a *wakf*. But if he were to add, not to be given, and not to be inherited, it would be a *wakf* for the poor."

SECTION IV.

CONDITIONS RELATING TO THE *WÁKIF* OR SETTLOR.

As a general rule it may be stated that all persons who are competent to make a valid gift are also competent to make a valid *wakf*. The settlor must be (1) free, *i. e.*, not a slave, (2) must be possessed of sufficient understanding to comprehend the nature of his action, must in fact be a *compos mentis;* and in order that the settlement may be valid in its entirety, (3) must be in good health, or more correctly speaking must not be suffering from an illness of which he dies subsequently. In such a case, if the settlement is in favour of an heir it is absolutely null, (unless consented to by the other heirs.) If it be in favour of a person

[1] Alamgiri after the *Muhit-i-Sarakhsi*.

LECTURE VI. who is not an heir or in favour of any pious or charitable purpose, it would take effect with reference to one-third.

(4.) The settlor must be the owner of the property which forms the subject of the appropriation.

(5.) The settlor must be adult, *i. e.*, must have attained the age of majority according to the law governing the status of minority.

All the schools are agreed respecting the capacity of the settlor or the appropriator. The Shiah Sharâya says, "And of the *wâkif*, it is required that he be of full age, sound understanding and unrestrained[1] in the use or disposition of his property." So the Fatâwa-i-Alamgiri,—"among the conditions of *wakf* are understanding and puberty on the part of the appropriator, as an appropriation by a boy or an insane person is not valid."[2] But the action of a mere imbecile is not absolutely invalid. "If a person who is imbecile," says the Radd-ul-Muhtâr, "makes *a wakf* upon himself and after him upon some other purpose which does not fail, it is valid according to Abû Yusuf, but the latter will take effect only upon its being sanctioned by the Judge."

A *wakf* upon one's self[3] amounts to a pious act. "The design in appropriation," says the Hedâya, "is the performance of an act of piety and piety is consistent with the circumstance of a person reserving the profits to his own use, as the Prophet has said, 'A man giving a subsistence to himself is giving alms.'"[4]

Where therefore, a person, who, without being absolutely *non compos mentis*, is weak in intellect, makes a *wakf* in his favour with remainder in favour of others, such *wakf* is valid so far as the settlement on himself is concerned, and with regard to the remainder it would be valid with the sanction of the judge.

[1] *i. e.*, not subject to any inhibition.

[2] *Badâia.*

[3] Radd-ul-Muhtâr.

[4] Hedâya, Eng. Tr. III, p. 238.

Any person who is sane and adult may constitute a *wakf*. But the same circumstances which may avoid a gift, *viz.*, undue influence (*ikrah*,) fraud, or want of comprehension of the nature of an appropriation may avoid a *wakf*.[1] In the case of *Delroos Banoo Begum* v. *Nawab Asghur Ally*,[2] the appellant had, in the year 1852, executed a *wakf-namah* dedicating all her properties for certain pious purposes. Upon a suit by the respondents to remove her from the management of the *wakf* on the ground of misfeasance, the High Court held as follows:— LECTURE VI.

Delroos Banoo Begum v. Nawab Asghur Ally.

"The judge holds that the defendant cannot now be allowed to say that she misunderstood the effect of the words she used or of the acts by which she consummated the *wakf*, and under ordinary circumstances no doubt a person would be rightly presumed to have known the consequence of his own deliberate act, but in this case the matter is somewhat different. The defendant is a *parda-nashin* Mahommedan lady, unable to read and write and generally ignorant as are most of her class; she has been examined, and she swears positively that she did not understand the meaning of the deed which she executed. She admits her wish to keep her estate for the purpose of perpetuating certain ceremonies in memory of her mother, and out of the hands of her legal heirs, and that to this end she, by the advice of her confidential servant Ali Jameen, signed a deed which she was told would have that effect. She swears positively that the *tauliatnamah* was only read over to her in Persian, a language which she did not understand, and that she had no idea of divesting herself by it of her proprietary rights. No evidence has been given to rebut this statement; only one witness to the *tauliatnamah*, Abdool Azeez (summoned by the defendant) has been examined, and he does not prove that the

[1] Jâma-ush-Shattat. [2] 15 B. L. R. p. 167.

Lecture VI. deed was ever read to the Begum in Hindustani, a language which she understood, or that its purport was explained to her. Her own acts have been, from the first, absolutely inconsistent with a knowledge that she had divested herself of her rights as proprietor by the *tauliatnamah*. From a time shortly after its execution we find her dealing with the property just as if it were still her own, selling, buying, borrowing, granting mukurari leases and exercising all the usual rights of ownership, and making everything as public as possible by registering the documents affecting these conveyances. I find, moreover, that long after the *tauliatnamah* was executed (namely, in 1871) the Collector of the 24-Pergunnahs gave pottahs to Delroos Banoo Begum, and this is a further argument in favour of the property never having been considered an endowment for public purposes under Regulation XIX of 1810, and treated her as the proprietor of her estate. It is, moreover, hardly likely that had Delroos Banoo Begum known what was the real effect of making a *wakf*, she would have headed her receipts for rents paid by the ryots with her name as mutwalli and a description of the estate as a *wakf* mehal, and still have gone on disposing of the property at her pleasure and as if she had made no *wakf* at all. From first to last, as it seems to me, her acts denote a person endeavouring to make such an arrangement of her property as would defeat the claims of her heirs and permit of the estate being retained for particular purposes, but always considering that she still retained the right to do what she pleased with the property so long as she lived."

But when a *wakf* has been created by a formally registered document by a person who is *sui juris*, and there is no reason to suppose that the settlement has been brought about by undue influence or fraud, it will not be

set aside. In *Fatima Bibi* v. *the Advocate General*,[1] it appeared that the plaintiff, a Mahommedan lady of the Sunni sect, by an indenture dated the 16th of November 1866, conveyed all her properties in trust for the purposes set forth in the deed, primarily for herself and her children and other descendants and ultimately for the poor. In 1881 she desired to revoke the trust. Upon a case stated under Sec. 527 of the Civil Procedure Code, West, J. held as follows :— LECTURE VI.

Fatima Bibi v. the Advocate General.

"A *wakf* must be certain as to the property appropriated, unconditional and not subject to an option. It must too have a final object which cannot fail and this object it seems must, according to the better opinion be expressly set forth. In the deed now in question it is set forth, and the reserve to the plaintiff for her life of the annual profits does not invalidate it, as such a consequence arises only when there is a provision for the sale of the *corpus* of the property and an appropriation of the proceeds for the donatrix. In the case of *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ali*, a dedication of property in *wakf* was declared invalid on the ground that the donatrix an illiterate woman though a wealthy one had not really known what she was doing in endowing the imambarah. The imambarah was within her own house, she had appointed herself joint mutwalli and her co-mutwalli had died. The property had never been treated as dedicated to a public religious establishment within the meaning of Act XX of 1863. Everything went to show that there had not been a true dedication, but the learned judge, who pronounced the decision of the court, said that if the instrument of *wakf* had been 'really and knowingly executed by the lady defendant it would have bound Delroos Banoo Begum without the power of revocation.'

[1] I. L. R. 6 Bombay Series, p. 42.

LECTURE VI. In the present case the direct ownership of the property was completely parted with. There was, it is said, a want of discretion on the part of the plaintiff and certainly a dedication made by a girl of fourteen is not to be upheld without enquiry, but here the transaction was never questioned by the plaintiff's husband during his life, and the plaintiff herself has for fifteen years confirmed her own early act by a continued acceptance of the profits of the estate from the trustees. She cannot now say with any reason that the dedication was invalid on account either of its ceremonial defects or of a want of an effectual accompanying volition."

"The case of *Abdul Gane Kasam* v. *Hussen Miya*[1] is an authority for the proposition that, under the Mahommedan law, an attempt by using the word *wakf* to create a perpetuity for the benet of a family will be ineffectual.[2] In the case of *Bibee Kuneez Fatima* v. *Bibi Saheb Jan*, there referred to, certain charitable objects are mentioned as the motive cause of the grant, but not as a purpose of the grant, the fulfilment of which is annexed to it as a condition or a trust. There was no dedication, even ultimately, solely to the worship of God or to any religious or charitable purposes. In *Abdul Gane Kasam* v. *Hussen Miya* there was no pretence of any such purpose. In neither, therefore, was there any creation of *wakf* in the proper sense with the peculiar attributes of that class of property, whereas in *Doyal Chand Mullick* v. *Sayud Keramut Ali*[3] there was a clear intention to dedicate to religious purposes. Though the *wakf* was mixed up with provisions of a different character, effect was given to the dedication, and in *Muzhurool Huq* v. *Puhraj Ditarey*,[4] Kemp J. says ' we are of opinion that the mere charge upon the

[1] 10, Bom. H. C. Reports, p. 17.
[2] 8 Weekly Reporter, p. 345.
[3] 16 W. R., p. 116.
[4] 13 W. R. 235.

profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family and for particular purposes and which, after they lapse, will leave the whole profits intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan law.' If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a *wakf* is not made invalid by an intermediate settlement on the founder's children and their descendants. The benefits these successively take may constitute a perpetuity in the sense of the English law, but according to the Mahommedan law that does not vitiate the settlement provided the ultimate charitable object be clearly designated."

"That a true *wakf* is irrevocable is stated in some of the cases I have referred to and it follows from the definition of the term. The consequences of the dedication are that even while the direct ownership is retained, the beneficial interest passes wholly from the appropriator. In the present case the direct ownership has been conveyed to the trustees. If the surviving trustee fails in his duty, which, in full accordance with the Mahommedan law, is largely discretional, the plaintiff or her representatives can enforce the fulfilment of the trust but the dedication once made cannot be recalled. Should the intermediate purposes of the dedication fail, the rule of Mahommedan law appears to be that the final trust for charity does not fail with them, it is but accelerated being itself regarded as the principal object in virtue of which, effect is given to the accompanying and intervening dispositions. Charitable grants being thus tenderly regarded, it would be inconsistent that a power of revocation should be recognized in the grantor. It is not recognized, and on the several questions submitted to the Court I must find against the plaintiff."

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Mr. Justice West's decision embodies in substance the following principles :—

(1.) That, under the Hanafi Sunni Law, a settlor may lawfully make a settlement in his own favour;

(2.) That a settlement once *validly* made cannot be revoked afterwards;

(3.) That the failure of the intermediate trusts in no way affects the validity under the Mahommedan law of the ultimate trust in favour of the poor.

Under the Mahommedan Law, the ultimate beneficiaries of every *wakf* for which no other object has been specified are the poor and indigent. No *wakf* therefore is likely to fail.

Islam is not a necessary condition to the creation of a valid *wakf*, but the law requires that there should be nearness between the object of the *wakf* and the appropriator,[1] for example, an infidel may not create a *wakf* in favour of a mosque, nor a Moslem for an infidel place of worship.

The *wakf* of a male apostate from Islamism is *bâtil* or void; that is, if a person make a *wakf* and then become an apostate, the *wakf* becomes *bâtil*. But the *wakf* made by an apostate after his apostacy is valid.[2]

If a woman make a *wakf* and then apostatise, her *wakf* is not void.

[1] Fatâwa-i-Alamgiri, II, p. 454. Comp. 16 W. R. 116.

[2] *Bahr*, Rudd-ul-Muhtâr, III., p. 557.

قوله او ارتد المسلم بطل وقفه ويصير ميراثا سواء قتل على ردته
اومات اوعاد الى الاسلام الا ان اعاد الوقف بعد عوده الى الاسلام ويصح
وقف المرتدة لانها لا تقتل بحر وفي هذه المسئلة الاغتفار فى الابتداء
لا فى البقاء عكس القاعدة فان الردة المقارنة للوقف لا يبطله بل يتوقف
بخلاف الطارية فانها تبطله بتا اهط وسيأتي تمام الكلام على ذلك
ال الفصل الآتي *

According to the Mussulman law, any person of whatever creed, may create a *wakf*. But, as already stated, it is a condition that there must be some relation, or "nearness," between the *wakf* and the objects of the *wakf*. For example, a Moslem cannot make a *wakf* in favour of an idol, a place of Christian worship, or any object whatsoever which is regarded in his law, as unlawful. Similarly, a Christian or Jew cannot lawfully convert his dwelling-house into a mosque to be used as a place of worship by Moslems so as to withdraw it from the inheritance of his heirs. The Fatâwa lays down the law on the point in the following terms:—

"If a *zimmi* should give his mansion as a *musjid* or place of worship for Mussulmans and construct it as they are accustomed to do and permit them to pray in it, and he should then die, it would become the inheritance of his heirs, according to all opinions,[1] and if the *zimmi* should make his mansion a temple or a church or a house of fire while he is in a state of health and should then die, it would be the inheritance of his heirs."[2]

The subject-matter of the appropriation must be the property of the *wákif* at the time the *wakf* is made, that is, he must be in a position to exercise dominion over it.[3] Consequently, if a *wakf* made by a person of some property of which he is in unlawful possession, but which he subsequently purchases from the rightful owner, such *wakf* is invalid. So also, when a man makes an appropriation for certain good purposes of land belonging to another, and then becomes the proprietor of it the *wakf* is not lawful; but it would become validly dedicated if ratified by the proprietor.

[1] Alamgiri after the *Jawâhir-ul-Akhlâti*.

[2] *Khassâf*.

[3] Sautayra, p. 360, Fatâwa-i-Alamgiri, II, p. 526.

LECTURE VI. When a person makes a bequest of some property to another, and the legatee prior to the death of the testator and before the legacy has vested in him, makes a *wakf* thereof, it is invalid. Nor can a *wakf* be made of property in which the full proprietary right has not vested in the person appropriating. There are certain exceptions, however, to this rule.

"If possession were taken of land given by an invalid gift, and it were then made a *wakf*, it would be lawful, the donee being responsible for its value; and if one should purchase by an invalid sale, take possession, and then make an appropriation of the subject of sale in favour of the poor, the *wakf* would be lawful, subject to the like responsibility for its value to the seller,but if the appropriation were made before taking possession it would not be lawful. When a man buys land by a lawful sale, and makes an appropriation of it before taking possession and paying the price, the matter is in suspense until he pays the price and takes possession when the *wakf* is lawful; but if he die without leaving any property, the land is to be sold and the *wakf* is void, and if a right is established in the property, or it is claimed by a *Shafi* under his right of preemption after the purchase has been made, the *wakf* is void."[1]

From the above rules the conclusion follows that any property in the possession of a person under a conditional grant cannot be lawfully appropriated, unless the appropriation is made with the sanction of the original grantor.

It is not necessary, however, that the entire subject-matter of the *wakf* should be actually in the possession of the *wâkif* at the time of the appropriation, for the appropriator may validly include in the *wakf* any property which he may subsequently acquire.[2] Nor is it neces-

[1] *Nahr-ul-Fâik.* [2] Sautayra, p. 389.

sary that the property which is dedicated should be entirely free from the rights or claims of other parties. Accordingly a property which is leased out to tenants, or which is under mortgage, or held in pledge can validly be dedicated.

Wakf of property subject to a lease or mortgage is valid.

"It is not necessary," says the Alamgiri, "that there should be an entire freedom from the rights of other parties, as for instance, in cases of pledge and lease, so that if one were to give a lease of his land and then to make a *wakf* of it before the expiration of the term, the *wakf* would be binding according to its conditions, but the lease would not be void, and on the expiration of the term, the land would revert to the purposes to which it was appropriated. In like manner, if a man should pledge his land, and then appropriate it before redeeming it from the pledge, the land would not be withdrawn from the pledge, and if it should remain for years in the hands of the pledgee and then be redeemed, it would revert to the uses for which it was appropriated. And if the pledgor should die before the redemption, yet if he leave enough to redeem the land, it is to be redeemed and the *wakf* is obligatory. But if he should not leave enough for that purpose, the land may be sold and the *wakf* would become void. In the case of a lease, when either of the contracting parties dies it is void and the land immediately becomes *wakf*."[1]

[1] Fatâwa-i-Alamgiri II, p. 458. When the land is sold for the payment of the mortgage debt, it does not necessarily follow that the *wakf* would be voided in its entirety. The *wakf* would attach to the balance of the sale proceeds after the payment of the debt; see the *Radd*.

The voidance of the lease on the death of the lessor or the lessee is a natural consequence of the principle of the Hanafi law, which holds that a lease cannot last beyond the lifetime of the lessor or the lessee. In this country, however, where leases are binding upon the heirs and representatives of the lessor, and are often hereditary (like the mourosi mokurrari ijaras,) the principle stated in the text would not apply. Where therefore, a piece of land which is already let in mouroosi ijara, is

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According to the Ordinances of Mufti Abû Saood, when a person, who is involved in debt, makes a *wakf* in favour of his children in order to defraud his creditors, (lit. in order to avoid the payment of his debts,) it is not valid.

When a property subject to a mortgage is constituted *wakf* and possession is transferred it will take effect, that is, operation will be given to it, and the Kazi will compel the *wâkif* to pay off the debt if he is solvent, but if he is insolvent, the *wakf* will be cancelled and the property will be sold to discharge his liabilities.

Wakf of an insolvent person.

But if a person is absolutely insolvent at the time of the dedication, and his debts more than exhaust the property which is dedicated, he is declared to be under inhibition for debt[1] and the settlement is consequently invalid. The principle governing these cases may be stated shortly thus :—if the settlor is heavily involved in debt at the time of the dedication or settlement, but has other property from which the debts can be discharged, the *wakf* is valid; if he has no other property and the subject-matter of the *wakf* is liable for such debts, it would be sold for the payment of his liabilities and any balance left from the sale proceeds would be applied for the purposes of the *wakf*. A *wakf* created before the debts are contracted is valid and is not subject to the liabilities of the *wâkif*.[2]

Wakf by a *Marîz* or a person

It is necessary also that the *wâkif* should not be suffering from a mortal illness at the time of the dedication in order that the entire *wakf* may be valid. In other words

dedicated. The ijara rent would become *wakf* and not the specific land; see the *Radd*.

[1] Alamgiri II, p. 458.

و منها ان لا يكون محجورا عليه لسفه او دين كذا اطلقه الخصاف كذا في النهر الفايق

[2] Radd-ul-Muhtâr after the *Bahr-i-Râik*.

the *wakf* of a person suffering from a mortal illness from which he dies takes effect as a bequest and operates with reference to one-third of the property of the donor.[1] But the *wakf* of a person made during illness from which he eventually recovers is valid with reference to the whole.

Suffering from a mortal illness.

"The *wakf* of a person suffering from a death-illness," says the Radd-ul-Muhtâr, "takes effect like the *hiba* of a person in that condition when transmutation of possession has taken place, *i. e.*, the *wakf* will operate as regards one-third of his estate. If the heirs, however, consent, it will take effect with reference to the whole. If some of the heirs consent it will take effect in proportion to their shares."

Kazi Khan following Imam Ibn-ul-Fazl states that *wakf* is of three kinds in relation to the state in which it is made:

(1) When it is made in health;

(2) When it is made in illness;

(3) When its operation is made dependent upon death.

"Change of possession and appropriation is necessary in the first, but *not* in the third, for that is testamentary in its nature; but the second is like the first, though it takes effect with reference to the third of the estate of the *wákif*, like a gift made in death-illness."

Testamentary wakf revocable.

It has been already stated that a *wakf* is irrevocable, but a *wakf* made by a person to take effect after his death, or what is called a *wakf* by way of *wasiut*, (*wakf-bil-wasíut*) is revocable at any time before his death.

[1] Fulton, p. 345.

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Section V.

THE CONSTITUTION OF A *WAKF*.

The constitution of a *wakf*.

The absence of uncertainty in the subject-matter of the *wakf* is also a condition,—not uncertainty in the object for which the dedication is made. Uncertainty in the object does not necessarily lead to the invalidation of the *wakf*, it often accelerates the application of the subject of the *wakf* to its ultimate object, *viz.*, the support of the poor, for they never fail.

The subject of the *wakf* must be certain.

But the subject of the *wakf* must not be uncertain.[1] Accordingly if a person were to dedicate anything out of his land without naming it, the *wakf* would be void, (unless it can be gathered from attendant circumstances what he intended to convey, when the *wakf* will be valid upon the basis of *istehsân*).

The dedication must also not be dependent for its operation upon a contingency which may or may not occur. A condition, however, to which operation can be given immediately will not render a *wakf* void. Examples of the distinction between these two provisions of the law are given at great length in most of the lawbooks, and I would quote some passages here to render my meaning clear.

Examples of contingent a *wakf*.

"If one should say, 'If my son arrives, my mansion is a charity appropriated to the poor,' and the son should arrive the mansion does not become *wakf*.[2] And if one were to say, 'This my land is charity if such an one please,' and the person referred to should indicate his pleasure, still the *wakf* would be void.[3] But when one

[1] Alamgiri II, p. 458. Radd-ul-Muhtar, III, p. 560. See the case of *Jugutmoni Chowdrain* v. *Ramjani Bibi* (I. L. R. 10 Cal. p. 533,) in which Mr. Justice Field lays down with great clearness the essentials of a Mahommedan *wakf*.

[2] After the *Fath-ul-Kadîr*.

[3] After the *Muhît*.

has said, 'If this mansion be my property it is appropriated as charity,' the appropriation is valid if the mansion actually be his property at the time of speaking, for the suspension is here on a condition that is actually fulfilled, and there is no contingency.[1] A man loses his property and says, 'If I find it, by God I will make a *wakf* of my land,' and he finds the property, it is incumbent on him to make a *wakf* of his land for the benefit of those to whom it is lawful for him to pay *zakât* or poor's rate, and if he should make it for those to whom it is not lawful for him to pay *zakât*, the *wakf* would not be valid nor would he be released from his vow.[2] If he should say, 'when such an one arrives,' or 'if I speak to such an one this my land is charity,' it is obligatory being in the nature of an oath and a vow, and if the condition happens it is obligatory on him to bestow his land in charity, but this is not an appropriation or *wakf*.[3] If a man were to say, 'if I die of this disease, I have made this my land *wakf*,' it is not valid whether he dies or recovers. But if he should say, 'If I die of this disease make this my land *wakf*,' it is lawful, for this amounts to the conditional appointment of a mandatory, which is legal.[4]"

Although, under the Hanafi law, a man may validly make a dedication in his own favour, he cannot reserve to himself the power of selling the property dedicated and applying the proceeds to his own use.[5]

An appropriation made with an option attached to it is invalid. The Fatâwa-i-Kazi Khan says:—"Also that no option be annexed to it, for if one should make an appropriation on condition that he is to have an option it would not be valid according to Mohammed, whether the time be

[1] Kazi Khan.

[2] After the *Sirâjia.*

[3] After the *Mûhit.*

[4] After the *Jouharat-un-nyerah.*

[5] Alamgiri II, p. 459 after the *Nahr-ul-Fâik.*

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known or not, and though the condition were cancelled, the *wakf* would not become lawful in his opinion. Abû Yusuf, however, maintains that a condition of option in favour of the appropriator for three days is valid. And they were both agreed with regard to the *wakf* of a musjid made on the condition of the appropriator's having an option that the *wakf* would be lawful and the option void."

Perpetuity a necessary condition of wakf.

"Perpetuity," says the Fatâwa-i-Alamgiri, "is also among the conditions of *wakf* according to all opinions, though according to Abû Yusuf the mention of it is not a condition and *this is correct*.[1] A man appropriates his mansion for a day, a month or any specified time without further addition, the *wakf* is valid and perpetual. But if he should say, 'This my land is a *sadkah* appropriated for a month and when the month has expired the *wakf* would be void,' the *wakf* would be void immediately according to Hillal because perpetuity being a condition, limitation to a particular time is not lawful.[2] If one should say, 'This my land is a *sadkah* appropriated after my death for a year,' without further addition, the appropriation would be lawful in perpetuity for the benefit of the poor, for the words have the meaning of a bequest.[3] And if one should say, 'This my land is a *sadkah* appropriated to such an one after my death for a year and when the year has expired the appropriation is void,' it would be a bequest after his death to the person referred to for a year and then it would become a legacy to the poor and its produce would be distributed among them. But if he should say, 'My land is appropriated to such an one for a year after my death,' without further addition, the produce would be to him for a year and then it would revert to the heirs."[4]

[1] After the *Kafi*. [2] Kazi Khan. [3] After the *Muhit-i-Sarakhsi*.

[4] Kazi Khan. The distinction between the two cases arises from the use of the word *sadkah* or charity in one and not in the other.

Perpetuity, therefore, is a necessary condition of a *wakf*, but its mention is not necessary at the time of dedication.[1] The effect of this is, that the ultimate remainder must be for an object which, actually, or by implication, does not fail. Under the Mâliki branch of the Sunni law, a *wakf* for a limited period of time is valid, but not so under the Hanafi law. According to the Hanafi school, if the *wakf* is in other respects good, the limitation as to time is void and the *wakf* takes effect as a perpetual dedication. If an object is mentioned which is likely to fail, the *wakf* is not void on that ground but the reversion is applied for the benefit of the poor. The following passage taken from the Radd-ul-Muhtár will throw considerable light on the subject:

"Abû Yusuf holds the declaration of *wakf* to be like a declaration to emancipate a slave. Accordingly he does not hold transfer or separation necessary.[2] According to him mere declaration is sufficient, as the declaration to emancipate is sufficient for emancipation, for the term *wakf* embraces the idea of the extinguishment of the right of property. It must be intended to be perpetual,[3] but perpetuity need not be mentioned; *wakf* implies perpetuity, consequently if the *wâkif* were to declare that a particular property of his was *wakf* for his children and say nothing further it is valid, and after the [failure of the] children the income will be applied for the benefit of the poor who never fail."

According to Abû Yusuf, like the term *wakf*, the term *sadkah* implies perpetuity and the two are convertible,

[1] Radd-ul-Muhtâr. The Shiah provisions are somewhat different and therefore require separate mention.

[2] According to the Mâlikis and Shiahs a change in the character of the possession is necessary.

[3] In this the Shiahs agree with the Hanafis; though *umras* are valid under the Shiah Law.

and he therefore holds that though the poor may not be mentioned the profits will go to them on failure of other objects. The mention of *sadkah* is to mention perpetuity. In short any term which implies perpetuity would be sufficient to create a *wakf*. For example, the mention of the poor, or *sadkah-i-moukoofa* for God, *moukoofa* for benevolence (*ihsân*,) or charity (*khair*,) or for *jehâd* (holy warfare,) shrouds, cemetries &c. *Moukoofa* for only one individual[1] is invalid without "difference of opinion." "But not if the terms used are *sadkah-i-moukoofa* as *sadkah* implies (a dedication for) the poor according to Abû Yusuf and the reversion will go to the poor and this is trustworthy. If a person create a *sadkah-i-moukoofa* for a man and for his children and for their children and grandchildren mentioning three generations, then it is perpetual *wakf* up to the day of judgment. But if a dedication is made to a specific musjid (مسجد معين)[2] it is valid according to Abû Yusuf without further mention of perpetuity, for a *masjid* is everlasting, and this is the recognized doctrine according to the *Muhît* adopted by the *Bahr*."[3]

According to Kazi Khan, explicit declaration that a *wakf* is created is sufficient to constitute a *wakf*. When a *sadkah-i-moukoofa* is made for a limited period without any mention that on the expiration of that period, the subject-matter of the *wakf* should revert to the appropriator, it would take effect as a *wakf* in perpetuity, but where a condition is made that it should revert to the donor it is *bâtil* or void according to Abû Yusuf.[4]

[1] Or more properly a specific individual, which implies the failure of the object on the death of the beneficiary.

[2] " معين means an object," says the Radd, "which is specific in its nature and therefore liable to failure. A musjid, however, cannot fail."

[3] Abû Yusuf's opinion must be followed and the Fatwas are according to the *Bahr*, the *Sadr-ush-Sharâya* and the *Radd*.

[4] Hillal holds that it will hold good for the period specified. This is in accordance with the Shiah doctrine.

Lecture VI.

A *wakf* for digging graves for the poor and providing shrouds is valid.

An opinion has been expressed by Imam Ali al-Sefdi that a *wakf* in favour of the Sufis is not valid. But this view is contradicted by other jurists. And the Shams-ul-Aimma has stated that a *wakf* is valid for all who are needy and indigent, and that when a *wakf* is made for a large body of people, it should be taken as referring to the poor and indigent among them; and if the *wakf* is general in its terms so as to include both rich and poor alike, the persons or the class of persons for whom the benefit is intended should be distinctly indicated, or it must appear from the words of the *wâkif* that though the terms are general, the intention is that indigence should furnish the claim to share in the benefit. For example, if the *wakf* is for orphans generally, it is valid and its benefit shall be applied to the poor among them. Hence, a *wakf* is valid for the lame and paralytic and the blind, the readers of the Koran, lawyers, traditionists &c., and it will be expended on the poor among them, for indigence is clearly inferrible from these words. For the blind, the lame, those who devote themselves to study and such like, cannot apply themselves to obtain a livelihood. Hence, indigence or want is their normal condition. And accordingly a *wakf* in favour of Sufis also is valid, for they are generally very poor and lead a life of austerity.[1]

Section VI.

THE CONSTITUTION OF *WAKF* ACCORDING TO *KAZI KHAN.*

The constitution of *wakf* according to Kazi Khan.

If a person declare simply "this my land is *moukoofa*," and fix the boundaries and say nothing more, according to

[1] Radd-ul-Muhtâr, p. 665.

LECTURE VI. Abû Yusuf it would constitute a valid *wakf* and the benefit thereof would go to the poor. If he say "this land of mine is *sadkah-i-moukoofa* or *moukoofa-i-sadkah*" and say nothing more, it will be a valid *wakf* (according to Abû Yusuf, Mohammed and Hillal,) and the benefit will go to the poor in perpetuity, for the poor never become extinct, and as the proper objects of a charity are the indigent, neither the express mention of the poor nor of perpetuity is necessary.

If he use the expression *sadkah-i-moukoofa-abadi*, it is valid according to all jurists. If the *wâkif* merely say "this land of mine is *wakf*," and say nothing further, according to Abû Yusuf the result is the same as if he had used the word *moukoofa*.

If the *wâkif* says "this land of mine is *mahrama-sadkah*," (consecrated or sacred charity,) it is tantamount to saying *moukoofa-sadkah*. If he merely says "this land of mine is made *hubs*," (that is, tied up,) it does not amount to *wakf*, unless the general purport of the grant implies a *wakf*.

If he says, "I have made this land *harâm*, I have consecrated it and it is consecrated," according to Abû Yusuf, its effect is the same as if he had used the expression *moukoofa*.

It would not be a *wakf* if he were to say merely, "*hiba-moukoofa*," or "*hiba-wakf*."

If he says this land is "*moukoofa* for God in perpetuity," it will create a valid *wakf*, though he may not have used the word "*sadkah*," and it will be a *wakf* in favour of the poor; and should he even not have used the words "in perpetuity," it will still be a valid *wakf* and the produce will be applied to the benefit of the poor.

Similarly, if the *wâkif* merely said "this is *moukoofa* for the sake of God," or "*moukoofa* for obtaining *sawâb* (reward) of God."

If a man make a bequest that one-third of his land will, after his death, be "*moukoofa* for God in perpetuity," this bequest will be a *wakf* for the poor.

If a man say "this land of mine is *sadkah-i-moukoofa* for such a person," it will be valid and the result will be that the ultimate beneficiaries will be the poor, for they are the lawful recipients of charity (*sadkah*,) but the produce will be given to the person mentioned during his lifetime.

If a person were to say, "this my land is *sadkah-i-moukoofa* for such a person in perpetuity," or that "it is for my *walad* in perpetuity," the same result would follow, the mention of the word "in perpetuity" not making any difference. So also if he say "this land of mine is *moukoofa* for the sake of charity or generosity (احسان)" or for both, it will be a valid *wakf* for the poor.

If a man say, "this land of mine is *wakf* for the purposes of *jehad* (religious fighting,) or for supplying shrouds to the dead, or burying them, or digging graves, or for any act of charity or piety which may be perpetual," it will form a valid *wakf* for that purpose.

Fakih Abû Jâfar has hold that where the purpose is designated and it is declared that it should take effect in perpetuity, it is sufficient and it is not not necessary to use the word *sadkah*.

If the grantor should declare a particular property to be a *wakf* for the travellers it wauld be lawful, for the travellers never cease; and its benefits will be applied to those who are poor among them and not to the rich.

Or, if he were to say that it is for the lame, decrepit or maimed, it would be valid (for these people are never wanting in the world,) and it will be applied to the poor among them.

When a person resolves upon dedicating his land for the purpose of a mosque and for matters appertaining to its

LECTURE VI. maintenance, so that it can never be invalidated, the usual and safe course to adopt is to make the dedication in the following terms:—"I have constituted this land (giving its boundaries) with all the appurtenances, a perpetual *wakf* for my life and after my death, on this condition that the rents and profits arising therefrom will alone be expended, and I declare that out of its profits the cost of collection, the usual taxes and other expenses incidental to the maintenance of the *wakf* and the keeping up of the mosque, the wages of the servants, &c., shall be first paid, that out of the balance shall be paid the cost of repairs and other necessary expenses; and the Mutwalli for the time being should have the power to vary the items as he may think proper. And if any thing remains over, after providing a reserve fund, may be applied to the support of the poor."

SECTION VII.

WHAT MAY BE CONSTITUTED AS *WAKF* OR THE SUBJECT-MATTER OF *WAKF*.

When a *wakf* is made of land, everything appertaining to the land, such as tenements, roads, ghauts, trees &c., attached to, or on the land, passes under it, but not partible produce. When land is dedicated for a cemetery, whilst big trees and buildings are on it, they will not be included in the *wakf*, though it may have been stated in the *wakfnamah* that the dedication is with all appurtenances and rights.

If there are fruit-bearing trees on the land or a *hammam* attached to the premises dedicated, and the dedication is made with the expression "with all appurtenances and rights belonging thereto," they will be included in the *wakf*. According to some accounts, Abû Yusuf is said

to have held the *wakf* of moveables invalid. In the *Mujtaba*, however, it is stated that according to Abû Yusuf, the *wakf* of such moveables as constitute the subject-matter of everyday transactions and dealings between people is valid. According to Mohammed the *wakf* of moveables is valid equally with the *wakf* of immoveables[1] "and the Fatwa is according to his opinion."

The *wakf* of *dirhams* and *dinars* (that is, actual money) is valid upon a "liberal construction of the law."[2] Zuffer and his disciple Ansari have categorically held that the *wakf* of money is valid. And in the *Manah* it is stated

[1] "According to the great Doctor Shams-ul-Aimma as—Sarakhsi," says Kazi Khan, "*wakf* of moveables is valid; custom and usage, however, regulate what moveables can be made *wakf*. The *wakf* of shrouds, books &c., are lawful according to all. The *wakf* of the milk of a cow is valid if customary. The *wakf of dirhems* (money) is valid. They would be applied in business and the profit arising therefrom would be used for the purposes of the *wakf*. In the same way a measure of wheat may be dedicated."

[2] Radd-ul-Muhtar, III., p. 578.

(و) كما صح أيضا وقف كل (منقول) قصدا (فيه تعامل) للناس (كفاس وقدوم) بل (و دراهم و دنانير) قلت بل ورد الامر للقضاة بالحكم به كما في معروضات المفتي ابي السعود *

قوله بل و دراهم و دنانير في الخلاصة الي الانصاري و كان من اصحاب زفر و عزاه في الخانية الي زفر حيث قال و عن زفر شر نبلالية و قال المصنف في المنح و لما جري التعامل في زماننا في البلاد الرومية وغيرها في وقف الدراهم و الدنانير دخلت تحت قول محمد المفتي به في وقف كل منقول فيه تعامل كما لا يخفى فلا يحتاج علي هذا الي تخصيص القول بجواز وقفها المذهب الامام زفر من رواية الانصاري والله تعالي اعلم و قد افتي مولانا صاحب البحر بجواز وقفها و لم يحك خلافا ملخ - مافي قال الرملي لكن في الحاقها بمنقول فيه تعامل نظر اذهي مما لا ينتفع بها مع بقاء عينها علي ملك الواقف و افتاء صاحب البحر بجواز وقفها بلا حكاية خلاف لا يدل علي انه داخل تحت قول محمد المفتي به في وقف منقول فيه تعامل لاحتمال انه اختار قول زفر و افتي به وما استدل به في المنح من مسئلة البقر الاتية ممنوع

LECTURE VI. that "the *wakf* of *dirhems* and *dinars*, which is customary in our times in the countries of Rûm[1] &c., must be held to come within the meaning of Mohammed's *dictum* upon which is the *fatwa*, *viz.*, that the *wakf* of every moveable which forms the subject-matter of human transactions is valid."

"The author of the *Bahr* has given a *fatwa* that the *wakf* of *dirhems* and *dinars* is lawful and has not stated any contrary opinion."

"My view is," says the commentator, "that though the specific money is expended in the actual application

بما قلنا ان ينتفع بلبنها و سمنها مع بقاء عينها لكن اذا حكم به حاكم
ارتفع الخلاف ـ ملخصا قلت ان الدراهم لا تتعين بالتيعين فهي و ان
كانت لا ينتفع بها مع بقاء عينها لكن بدلها قائم مقامها لعدم تعينها فكاءنها
باقية و لاشك في كونها من المنقول فحيث جري فيها تعامل دخلت فيما
جازه محمد و لهذالما مثل محمد باشياء جري فيها التعامل في زمانه
قال في الفتح ان بعض المشايخ زادوا اشياء من المنقول علي ما ذكره
محمد لما راو جريان التعامل فيها و ذكر منها مسئلة البقرة الاتية
و مسئلة الدراهم و المكيل حيث قال ففي الخلافة وقف بقرة على ان
مايخرج من لبنها وسمنها يعطي لابناء السبيل قال ان كان ذلك في
موضع غاب ذلك في اوقافهم رجوت ان يكون جائزا وعن الانصاري وكان من
أصحاب زفر فيمن وقف الدراهم او ما يكال او مايوزن يجوز ذلك قال
نعم قيل و كيف قال يدفع الدراهم مضاربة ثم يتصدق بها في الوجه
الذي و قف عليه و ما يكال او يوزن يباع و يدفع ثمنه لمضاربة او بضاعة
قال فعلي هذا القياس اذا وقف كرامن الحنطة علي شرط ان يقرض
الفقراء الذين لا بذرلهم ليزرعوه لانفسهم ثم يوخذ منهم بعد الادراك
قدر القرض ثم يقرض لغيرهم من الفقراء ابدا علي هذا السبيل يجب
ان يكون جايزا قال ومثل هذا كثير في الري و ناحية دوماوند
و بهذا ظهر صحة ما ذكره المصنف من الحاقها بالمنقول المتعارف علي
قول محمد المفتي به و انما خصوها بالنقل عن زفر لانها لم تكن
متعارفة اذ ذاك و لانه هوالذي قال بها ابتدء قال في النهر و مقتضي
ماصر عن محمد عدم جواز ذلك أي وقف الحنطة في الاقطار المصرية
لعدم تعارفه بالكلية نعم وقف الدراهم و الدنا نير تعارف في الديار الرومية *

[1] Turkey.

to the purpose for which it is set apart, yet as its value does not depend on its retaining its specific character, therefore the loss of that character is no bar to its being made *wakf*"[1]. According to the later jurists the *wakf* of every article which forms the subject-matter of commercial transactions is valid.

"Ansari was asked whether the *wakf* of money or of anything which could be weighed or measured was valid? He answered yes; on being asked—how? He answered in the way of *shirkut-muzâributt*." A *shirkut-muzâributt* is a partnership in which one partner advances capital and the other gives his labour; that is, the proceeds of the money invested in partnership business or other transactions employed in trade, or any other dealing, which may be customary, can be validly devoted to the purposes of the *wakf*. "It is in this way that the *wakf* of a measure of wheat is held valid. For example, in certain places near Damawand, such as Rai[2] and its neighbourhood, it is customary to make a *wakf* of wheat which is done in this way,—a quantity of wheat is constituted *wakf* and then given to the poor peasantry who are unable to procure seedlings. They, after reaping their crops, return the wheat, and this measure of wheat is again given to others who are in the same condition. The result is, that wherever it is customary to make a *wakf* of a certain moveable thing it is valid." "In Egypt," adds the commentator, "it is not customary in our times to make a *wakf* of wheat. In the territories of Rûm it is customary to make a *wakf* of money."[3]

[1] These authorities were evidently not pointed out to the learned Judge who decided the case of *Fatima Bibi* v. *Ariff Ishmailjee Bham*, 9 Cal. L. Reports, p. 66. I have given here only the general purport of the passage in the Radd-ul-Muhtar bearing on this question. For a further explanation of this passage see the appendix to this chapter.

[2] Ancient Rhages.

[3] The above doctrines will explain the following passage in the Hedâya :

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Anything which is capable of being weighed or measured when made *wakf* will be sold, and its proceeds invested in commerce or partnership business. The *wakf* of such articles as wheat and milk will have effect given to it by being loaned to the poor. Where such *wakfs* are customary they are lawful, like the *wakf* of cauldrons to cook food for distribution to the poor, or of shrouds, or Korans. "In ordinary usage, analogy (*kyás*) has no application."[1]

"The appropriation of things which are consumed in using, such as gold and silver, or eatables and drinkables, is not unlawful according to the generality of the lawyers, but by gold and silver are not to be understood dinars and dirhems or what is not ornament. And if one should make an appropriation of dirhems or things estimated by measure, or clothes it would not be lawful. But it is said that in places where this is customary, decrees are given in favour of the legality of the appropriation."

"If it be asked how, that is, how can the money be applied? it is answered that the dirhems may be lent to the poor and taken back again or given in *muzarabat*, and the profit laid out in charity, and wheat may be lent to the poor to sow and then taken from them, and clothes lent to them to wear when necessary and then taken back."

"It is not lawful to appropriate moveables, the appropriation of which is unusual or uncommon according to our doctors. The argument of our doctors is, that appropriation requires perpetuity, according to what has been already stated and this cannot exist in moveables since these are not of a lasting nature, analogy therefore suggests that the appropriation of movables in general is unlawful; it is admitted, however, in some articles (although contrary to analogy) because of the traditions already recorded and in other articles (such as axes, saws and so forth) because of utility, but the appropriation of furniture, clothes and slaves is unlawful as being contrary to the suggestions of analogy, because they have neither tradition nor utility to support the legality, and therefore resemble dirhems and dinars. Hed. II, (Eng- Tr.) p. 344.

[1] In saying that analogy does not apply to usage, the author means to say, that analogy declares that when perpetuity is an essential condition of *wakf*, and a moveable property cannot exist perpetually, a *wakf* of moveable property *primâ facie* cannot be valid. But, according to present usage, wherever it has become customary to make *wakf* of any kind of moveable property, it will be held valid notwithstanding that, in the time of the Companions, the custom may not have existed. From this it is evident that the appropriation of moveables depends purely upon the circumstances of the age and the conditions of society and the usages of the people. According to this principle, the appropriation of mere rights and *profits à prendre* would appear to be valid.

It has been held that the *wakf* of warm clothings to the poor which would be used in winter and then returned is lawful. The *wakf* of Korans for the use of students in a mosque implies the use of those Korans in the mosque itself.

When a *wakf* is made of books for the people of a particular locality they cannot be removed from that locality.

When there is a dedication of money, the profits arising therefrom applied in commerce or partnership business will be devoted to the purposes of the *wakf*.

The *wakf* of copper and other utensils is valid.

When a mansion has been appropriated, everything that would be included in its sale would be included in the *wakf*, whether it be mentioned or not that it is made *wakf*, "with all its rights and everything, small and great belonging to it, or in, or of it." So also in the *wakf* of shops everything is included that would be included in the sale thereof.

In the *wakf* of lands, the buildings and trees standing thereon are included, but not the fruit then on the trees, nor the crop if the land has already been sown. Canes and other plants that are cut annually are not included, but such as are cut biennially are included in the *wakf* of the land.

Khassâf mentions in his Book on *Wakf*, that when an appropriation is made of land for specified purposes with the ultimate reversion in favour of the poor, the buildings on the land, and the palm and other trees are included in the *wakf*. He also mentions that existing fruit is not included in an appropriation of trees, and most of "our" Shaikhs are of that opinion, and it is correct. When a *wakf* is made in the following terms—"I appropriate this my land as a *sadkah* with its rights, and all that is in it, and of it," and there happens to be at the time fruit on the trees, he ought to bestow the fruit in charity on the poor,

LECTURE VI. though not by way of *wakf* but by virtue of his vow, on a favourable construction, and what is subsequently produced is to be applied to the purposes specified in the *wakf*. Similarly, when a *wakf* is made in the following words, "my land is appropriated as a *sadkah* after my death, to the end that what produce God may cause to come out of it shall be to the servants of God," upon the death of the *wâkif* the fruit actually on the trees are not included in the bequest by virtue of the *wakf*.

It is not necessary for the validity of a *wakf*, that the boundaries of the land or house appropriated should be specifically set forth. It is only requisite that it should be clearly ascertainable what is constituted as *wakf*. Where therefore a house or land is well-known, it may be made *wakf* without specifying the boundaries. "And though the witnesses may testify that the land was not bounded in their presence and they did not know it," the *wakf* will not be invalid on that account.

When a man has appropriated his land without mentioning a right of water or way, both are included "on a favourable construction," because land is not appropriated except on account of what it will produce and for that purpose both rights of water and way are included.

Mills in a field (*zayât*) whether turned by water or hand and Persian wheels and buckets used for raising the water are included in the appropriation thereof.

Wakf of *mushaâ* valid.

The *wakf* of *mushaâ* is valid according to Abû Yusuf whose opinion is recognised as law. But the *wakf* of a *mushaâ* for a mosque or tomb is not lawful, as the object of the *wakf* is destroyed by the fact that it is *mushaâ*.

Confusion in things that do not admit of partition does not prevent the validity of a *wakf*; and on this point there is no difference of opinion, for the *wakf* of half a bath is lawful, though it be confused.[1] But the *wakf*

[1] After the *Zahîria*.

of an undivided share in a thing that admits of partition is not lawful according to Mohammed, whose opinion has been adopted by the Shaikhs of Bokhara and (formerly) decisions were according to it.[1] The moderns, however, decide according to the opinion of Abû Yusuf, who held that it was lawful; "and this is approved.[2]" Both doctors agree in negativing the *wakf* of *mushaá* for a *musjid* or a tomb, whether the property be susceptible of division or not.[3] And when the judge has decided as to the validity of a *wakf* of *mushaâ*, his decree is operative, as in all other matters on which there is a difference of opinion.[4]

If the property be divisible, and any of the parties should, after the decree of validity, demand a partition of the property, according to Abû Hanifa it is not to be divided, but in the opinion of the two disciples, a division should be made.[5] But they are all agreed that if the whole of a thing be appropriated, and the parties desire a partition, it would not be lawful.

When one has appropriated his share in land held in joint ownership with another, the person with whom a partition is to be made is the partner, and after his death, his executor.[6] When a person appropriates half of his land, and appoints a mutwalli therefor, the judge is authorised to make the partition upon an application to that effect on the part of the mutwalli or the *wâkif*.

SECTION VIII.

CONDITIONS RELATING TO *WAKF*.[7]

A gift of *mushaá* is lawful according to Abû Yusuf, and his opinion has been adopted by the jurists of Balkh,

[1] After the *Sirâjia*.
[2] After the *Khazânat-ul-Muftiîn*.
[3] After the *Fath-el-Kadir*.
[4] After the *Sharh-abi'l Makârim bil-Nikâya*.
[5] After the *Khulâsa*.
[6] Alamgiri, II, p. 466.
[7] Kazi Khan.

LECTURE VI. whilst Mohammed holds it to be invalid and the Shaikhs of Bokhara have adopted his views. The Hanafis of India have adopted the former opinion. In case of any dispute regarding the *wakf* of undivided property, the Kazi can decree partition.

If a person dedicate a moiety of a *hummam*, it is valid according to all, for it is *mushaá*, which is not partible. Accordingly, a *wakf* thereof is lawful like a gift.

A woman in her death-illness makes a *wakf* of her house for her three daughters and after them for the poor. She dies leaving no other property but this house, and no other heir but these daughters. According to Abû Yusuf the *wakf* will take effect with reference to one-third unless all the daughters consent.[1]

When a piece of land belongs jointly to two individuals, who make a *wakf* thereof for the poor or for any good purpose and transfer possession to the mutwalli, it is valid according to all the jurists.

When two persons are in joint possession of a piece of land and one of them dedicates his share for his children (*i. e.*, his descendants) in perpetuity as long as any of them happens to exist, and upon their failure for the poor, and another partner dedicates his share for his *brethren* and the *people of his family (ahl-i-bait)* and on their failure, for the performance of pilgrimages, and both of them consign the trust to one and the same mutwalli such a *wakf* is valid. Similarly, if one of the partners dedicates his moiety for the poor, and the other his moiety for another purpose, it would be valid. This is according to both Mohammed and Abû Yusuf. But the latter does not insist upon consignment to a mutwalli as

[1] Mohammed differs and the *Fatwa* (says Kazi Khan) is according to him. But see Fatawa-i-Alamgiri, II, p. 455. A *wâkf* intended to operate after the death of the *wâkif* takes effect with reference to one-third of the estate of the appropriator Fulton's Reports, p. 345.

an absolute essential. And as he does not insist upon consignment or delivery of possession for the validity of a *wakf, so according to him partition is not necessary.* LECTURE VI.

If a person declare, "I make a *wakf* of my share in this house which is one-third," and it afterwards appears that his share amounts to half or two-thirds, the entire share will become *wakf.* Similarly, if a man were to say in his will, "I leave to so and so one-third of my property, *viz.*, 1000 dirhems," and it turns out subsequently that the one-third of his estate amounts to 4000 dirhems, the legatee will get the latter sum. This is different from sale in which the vendee would only get the amount specified.

When two persons are jointly entitled to many houses, or where a land is jointly held by two partners, and one of them dedicates his share in all those houses or in that specific land for a pious purpose, and afterwards desires to have a partition of his share effected by the Kazi, and the Kazi in effecting the partition allots to the *wâkif* one house or one specific plot for his interest in all the houses or in the entire land, the *wakf* will take effect with reference to that house or that specific plot of land. Hillal, Mohammed and Abû Yusuf are agreed on this point.

Where two persons jointly own a piece of land, and one of them dedicates his share, the *wakf* is valid according to Abû Yusuf.

As regards the *wakf* of a building without the land on which it is built, there has been considerable difference of opinion on the part of the jurists, though the difference is easily reconcilable if the principle which governs such dedications is properly understood. The celebrated Allâmah Kâsem declared that such a *wakf* was not valid and he appears to have followed the views of Mohammed

LECTURE VI. and Hillal-ibn-Yehya Basri on this point. But in the *Bahr* it is stated from the *Zakhira* that where it is not customary to dedicate a building without the land upon which it is erected, the dedication of the building without the land is not valid; but where it is customary to do so, the dedication is valid.

Wakf of building without the land valid.

It is worthy of note in relation to this point to mention the disputation which took place in the year 872 A.H. in the presence of Sultan Malik-uz-zâhir, in a Convocation held for the purpose, between the *Allâmah* and his celebrated disciple Abdulla-ibn-Shahna who held, in opposition to his master, that the *wakf* of a building without the land was valid, that this doctrine had been recognized for over two hundred years, and repeated decisions had been passed in accordance therewith by learned Kazis. This view of Ibn Shahna has been combated by Allámah Mohammed ibn Zaheera. But the question properly understood admits of no difficulty. The author of the Radd lays down the proposition broadly, "that the *wakf* of a moveable thing of which it is customary to make *wakf* is valid; so the *wakf* of a building without the land when it is customary is valid, and this doctrine is not in conflict with the views of those who hold that such a *wakf* is not valid, for the question of validity turns upon the custom recognized in the locality where the *wakf* is made. If people are in the habit of making such *wakfs*, the law will recognize them as valid."

The doctrine, however, now in force is, that the *wakf* of a building without the land is valid and the *fatwa* is accordingly.[1] So also the *wakf* of trees standing on the ground without the soil is valid.

The *wakf* of land which is in lease or which is subject to a mortgage is valid.[2]

[1] Kazi Khan; Radd; Hedâya. [2] 12 W. R., 498.

A person, who has taken a lease of *wakf* land, may validly build a mosque on it. Question, who should pay the rent of the ground over which the mosque is erected? The commentator replies by saying that as long as the lease is in existence the lessee shall pay the rent; and after the expiration of the lease, such rent shall be paid from the public treasury or by the congregation.

When a *wakf* is made of land which is leased to another person, the lease is not cancelled; it continues in force until the end of the term, and on its expiration the income arising from the leased property is to be applied to the purposes of the *wakf*.

As regards the *wakfs* of Kings and Ameers,—

Jagirs (*iktaât*) are of two kinds, one where the land has been granted in fee, that is, the Sovereign has purchased it from the *Bait-ul-mâl* and presented it to the grantee, or it is a portion of the royal domains; 2nd, where the usufruct is only granted, and the jagir is vested in the Crown. In the former case, the grantee may make a *wakf*, in the latter case, not.

In the Alamgiri occurs the following remark on this subject:—

"It is a branch or consequence of property being a condition, that the appropriation of *iktaât*, or concessions, is not lawful, except when the concession is of waste land, or of land belonging to the Imam himself, which he has granted to the person. Nor is the *wakf* of *houz* land in the possession of the Imam lawful, for it is not his property. And by *houz* is to be understood land which the owner is unable to cultivate and pay its khiraj, or land-tax, and has surrendered it to the Imam that the yearly profits may be applied in payment of the khiraj."

"If the land has been validly purchased from the *Bait-ul-mâl*, the *wakf* thereof is lawful whether the purchaser

LECTURE VI. be the Sultan or any private person, and the *wakf* will be governed by the conditions which the wâkıf may validly impose on the *wakf*."

"If the Sultan has even without purchasing it, set apart any portion of the public land, *i. e.*, land which yields revenue to the public treasury, by way of *wakf* of a permanent inalienable character for any charitable or pious purpose, such *wakf* is valid. And the Allâmâh Kâsem has given *fatwa* according to this principle, when he was asked regarding the appropriation made by Sultan Fârûk, who had set apart a portion of the public lands for the purpose of a mosque; and he also held that no future Sultan could set aside the *wakf*."

The principle then is, that if the Sultan makes any *wakf* from the *Bait-ul-mâl* for any purpose of public utility, such as a mosque, caravanserai, a Madrassa, &c., it is valid, for it is lawful to set apart from the public revenue an allowance to maintain such objects; and the King is authorised to set apart the land sufficient to pay the allowance in question, instead of disbursing the expenses periodically from the public treasury. But he cannot make a *wakf* of public lands in favour of his children, even though the ultimate reversion may be reserved for the poor. But he may make a *wakf* for any object from which benefit accrues to the generality of Mahommedans, for the *Bait-ul-mâl* is for the benefit of Moslems at large.

CHAPTER VII.

THE *MOUKOOF ALAIHIM* OR THE OBJECTS OF *WAKF*.

Section I.

A *wakf* can be validly made in favour of every person who possess the capacity of owning property as well as in favour of unborn children and objects of charity. Lecture VII.

It can be made in favour of,

(*a*) a Mussulman or a *Zimmi*, but not in favour of an alien or *harbi* (an inhabitant of the *Dâr-ul-harb*;[1]

(*b*) of men as well as women;

(*c*) of majors as well as minors;

(*d*) of heirs as well as non-heirs;

(*e*) of one's kindred, neighbours, &c;

(*f*) of strangers;

(*g*) of objects of benevolence, charity, piety, for

[1] The Moslem jurists, like the jurists of Christendom until very recent times, denied the privilege of the *jus gentium* to all non-Moslems who did not own allegiance to the Moslem sovereigns. But they were in advance of the Christian jurists in holding every Mussulman of whatever country or race to belong to one nationality and entitled accordingly to all the privileges springing therefrom. Like the Christians, they divided the world into two portions, one the *Dâr-ul-Harb*, the country of warfare, and the other the *Dâr-ul-Islâm*, the country of peace. Juridically, all Mussulman nations were at peace with each other. As a matter of fact, no Mussulman sovereign could declare war against another, without first pronouncing him to be a heretic and beyond the pale of Islâm.

LECTURE VII. example, madrassas, mosques, the rouzahs of the Imams, imambarahs, durgahs,[1] khânkahs, the holy shrines &c.

(*h.*) Under the Hanafi law, a *wâkif* may constitute himself the first beneficiary of the trust.[2]

When a *wakf* is made for an undefined number of people, such as for the poor generally, Mohammed says, at least, 10 must be fed or supported; according to Imam Abû Yusuf, 100; others, again, have held that the number ought to be 40 or 80. But the *fatwa* is that the fixing of the number should be left to the Hâkim with due regard to the circumstances of the *wakf.*

Rents and profits of a *wakf* property must be first applied towards its maintenance.

The income of a *wakf* must be first applied to its maintenance. After the costs of repairs &c. have been defrayed, the balance should be applied towards the performance of the work connected with the trust and the payment of the salaries of the officers. "When a *wakf* is made for students *and the wakf is small*, only poor students will be supported. But generally the word 'students' implies want, and when a *wakf* is made for students in general, it is confined to indigent students alone, for students are almost all in straitened circumstances. Similarly, the *wakf* of a Koran in a musjid and books in a madrassa is generally confined to the poor, unless it can be shown that the books are not available." According to the *Khulâsa-i-waknieh*, however, in the case of a *wakf* of books or of a *wakf* to students, the poor stand in the same category as the well-to-do. It further lays down the principle that such *wakfs* may be looked upon from two points of view,—(1) that the poor and rich are equal as in

[1] *Durgahs* are the tombs of saints. In India, both Mussulmans and Hindus flock to these places, and make votive offerings of all kinds. There is a celebrated *Durgah* called *Maula Ali ki Durgah* in Calcutta. Rouzahs and Imambaras are Shiah institutions.

[2] Radd-ul-Muhtâr, III, p. 598.

the case of *Lungur-Khânehs*,[1] *Mussafir Khânehs*, cemeteries, tanks &c., the benefit of which is shared by all alike. "In respect of the benefit arising out of these objects of *wakf*, custom makes no difference in the position of an indigent and a well-to-do person. In the case of a *wakf* of books, the rich student stands in the same position as the poor regarding the difficulty of obtaining some of the books; and it must be remembered that the object is to benefit all." This seems to be the generally accepted doctrine. (2) That the *wakf* is only for the poor.

Wakf in favour of students.

If a *wakf* is made of books for a certain place, their use will be restricted to that place, and the books will not be allowed to be taken away from there. And if it is for students, then every student is entitled to make use of them but cannot remove them from the place. In matters relating to the use of a *wakf*, the provisions made by the *wâkif*, if legal, should be followed. The jurists look upon the conditions imposed by the *wâkif* as conditions imposed by the law. But in order that any restrictive condition may be binding, it must be satisfactorily proved that the *wâkif* really and intentionally imposed the same.

The rents and profits arising from a property which is constituted *wakf* must first be applied, as stated already, towards the repairs and maintenance of the *wakf* property and the payment of the wages of the care-taker or custodian. If there are any debts on the *wakf* property, the mutwalli should, either by leasing the property or in any other reasonable manner, liquidate such debts.

"When the *wakf* is in favour of individuals, the building cannot be enlarged without their consent." In other words, the beneficiaries of a trust have a right to be consulted in any alteration in the character of the

[1] A *Lungur Khâneh* is a place of refuge for travellers, where food is supplied to them gratis.

LECTURE VII. subject of the *wakf* as may be likely to entail serious expenditure. But this is the case only where the trust is primarily for them. But where the trust is primarily for some religious purpose which, however, is not distinctly specified, the rents and profits after deducting the costs of maintaining the *wakf* should be applied to such objects as are similar in character to the original purpose. That is, after the erection of the building and its maintenance, any residue shall be expended on objects which approach most closely in character to the implied object of the dedication and are necessary to the proper carrying out of the purpose for which the appropriation is created.[1]

Disbursements from *wakf* property.

"For example, if a dedication is made for a madrassa and nothing further is said, the residue of the rents and profits after deducting the cost of maintaining the building shall be applied to maintain the proper staff of teachers. Similarly, when the dedication is to a mosque, the balance shall be applied to the employment of the usual servants and the supply of the usual articles of furniture &c., necessary for the performance of the wor-

[1] Fatâwa-i-Alamgiri, II, p. 468.

"The income of a *wakf* is to be expended in the first place on necessary repairs whether the appropriator has made it a condition or not, and next, if nothing else has been specified, on such things as are nearest and most essential to the general purpose of the appropriation.

As for instance in providing an Imam for a masjid or place of worship and a professor for a Madrassa or College.

But if anything else has been specified the income must be applied to that immediately after the repairs."

So also the Hedâya :—

"It is incumbent that the income of an appropriation be in the first instance expended in the repairs of it, whether the appropriator may have stipulated this or not, because his design was that the income should serve as a perpetual fund, and as a perpetual income cannot be drawn from the article appropriated unless it be preserved in continual repair, that is a necessary attendant upon it, and also because all acquisition must be attended with expense, in other words he who enjoys the profit must also bear the loss."—Hed. II, Eng. Tr. p. 346.

ship, even though the *wâkif* should not have mentioned it." The primary object should be to maintain the purpose for which the dedication is made. If a dedication is made to a mosque and the salary set apart for the Imam is not sufficient to employ one, the provision made by the donor should be set aside and a reasonable allowance should be made for that purpose. A mosque once dedicated, should not be allowed to lie useless. The result is that in the first place the cost of maintaining the *wakf* should be defrayed from the income and after that, each object will take precedence in accordance with its relative importance. But if the expenses are specified by the *wâkif*, care will be taken to carry out his wishes with due regard to the primary object of keeping up the *wakf*.

"In the application of the proceeds, the first thing to which attention should be directed is the maintenance of the *wakf*. Should the entire income be necessary to put the *wakf* buildings or property in repair, it may be so applied and no person not even the Imam or Muezzin should get any salary until the repairs are made." [This passage shows the importance which is attached to the maintenance and preservation of the *wakf* institution. The primary object of the *wakf* being the perpetual endowment of the institution for religious and charitable purposes, the law insists that the first duty of the curator should be to preserve the building in a state of repair, and if it is in such a condition that it is likely to fall into ruin, the income is to be applied primarily for its restoration and repair.] "If anything remains over after defraying the cost of repairs, it should be given to those whose discharge would cause injury to the *wakf*. After this has been done, the other matters connected with the *wakf* should be carried into effect with due regard to their relative importance. Those people from

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whose dismissal no injury would accrue to the *wakf*, will not get any portion of their allowance until the absolutely necessary repairs are completed. But when those people do work for the *wakf* they will get their proper wages though not the allowance fixed in the wakfnamah."

[This refers to a case where the income is not sufficient to defray the costs of the repairs as well as pay the full allowance of the servants of the *wakf* or of the beneficiaries.]

The *cy près* doctrine in the Mahommedan law.

Mere vagueness or uncertainty will not lead to the failure of a *wakf*, for in such a case the law itself would supply the defect by declaring that the trust should be in favour of such objects as approach nearest in character to the intended object of the *wakf;* or, even when that is not expressed, to the support of the poor and needy. In the absence of explicit directions on the part of the wâkif, the hâkim has the power of framing a scheme by himself or in consultation with the beneficiaries, for the administration of the *wakf*. The principle, therefore, laid down in *Morice* v. the *Bishop of Durham*,[1] which it has been occasionally endeavoured to apply to *wakfs*, is not applicable to trusts under the Mahommedan Law. For the *cy près* doctrine is carried to the utmost limit in the Moslem system, and the failure of the original purpose does not in any case cause the failure of the *wakf*.

The poor are the ultimate beneficiaries in every *wakf*.

The poor form, by necessary implication of the law, the ultimate beneficiaries of every trust, even such as are private in their nature, like family settlements. Where, therefore, the primary object fails, such failure instead of voiding the trust "only accelerates" the ultimate application.[2]

[1] 10 Vesey, p. 399.

[2] The principle underlying this doctrine is fully set forth in the judgment of Mr. Justice West in the case already referred to, *Fatima Bibi* v. *Advocate General*, I. L. R. 6 Bom., 42.

Again, where the dedication is to a religious or charitable institution, which, in course of time, ceases to exist, the property so dedicated, instead of reverting to the grantor or his heirs, would be applied to some other religious or pious institution, similar in character to the one which has failed, or to any other object by which benefit may accrue to human beings.

Application of the proceeds of the *wakf* property.

"When the *wâkif* has provided that after defraying the costs of repairs and maintaining the institution, the surplus should be distributed among the poor or *hukdars* (beneficiaries), it is nevertheless incumbent on the mutwalli to deduct every year a certain sum from the income for repairs, even though there is no immediate need for it—so as to enable him to provide a fund therefor; for it so happens that owing to some unforeseen contingency, there may not be any income at the time." "If a house is made *wakf* for another person, he is entitled only to the income arising therefrom but not to occupy it. Similarly, the person for whose occupation the house is made *wakf* is not entitled to its income." The correctness of this doctrine appears to have been doubted, and in any case the Kazi would have it in his discretion to authorise any act which may be beneficial to the *wakf*. The principle, however, which is deducible from the above doctrines is, that the beneficiaries, cannot, of their motion, under any circumstance, change the nature of the dedication.

The mode in which a *wakf* building ought to be used.

Kazi's discretion.

If there is no income at all accruing from the *wakf*, and the endowment property is going to ruin, the Kazi has the power to authorise the mutwalli to let the building temporarily or any portion if it, and with the proceeds thereof to repair it. Where the income of the *wakf* premises is not sufficient to cover the outlay in its maintenance, or when the *wakf* is falling into ruin, and there is

LECTURE VII. every probability of its dissolution, and the income is not sufficient to cover the cost of repairs, the Kazi has the power of directing that it may be sold and with the proceeds thereof certain other property may be purchased subject to the same trust.

This doctrine is laid down by Abû Yusuf and it will be acted upon as long as it is possible to do so. If it is impossible to sell the *wakf* property or to apply the proceeds of the sale for the beneficiaries or for the benefit of the poor, in that case effect would be given to the doctrine of Mohammed, that where the purpose fails the property reverts to the heirs of the donor.

SECTION II.

DEDICATION TO MOSQUES.

A valid dedication has the effect of divesting she *wâkif's* right of property in the subject matter of the *wakf*, without vesting it in the *cestui qui trust;* consequently the subject of the *wakf* can neither be inherited nor transferred.

The right of a person in a building or place which he proposes to consecrate for *musjid* or *mussalla*,[1] becomes extinguished upon the performance of prayers therein. This is by general consensus. According to Abû Yusuf, it also becomes extinguished upon the declaration of the wâkif that the building or place has been constituted into mosque or *mussalla*.[2] According to the *Multeka*, the performance of prayers is equivalent to consignment. But in the *Zakhîra* it is stated that the prayers must be congregational, *Salwat-bil-jamaet*, which is unanimously

[1] A place where prayers are offered, from *salwât*, prayer.

[2] Radd-ul-Muhtar III, p. 571.

regarded as tantamount to delivery. So that when a person erects a building with the object of dedicating it as a mosque, and permits people to offer prayers therein, and prayers are offered there *bil-jamáet*, the mosque becomes irrevocably dedicated.

When a mosque is erected or set up inside a dwelling-house or residence (*dâr*) and permission is granted to the public to come and pray, and a pathway is also made or set apart for their egress and ingress, the dedication is good by general consensus. If a pathway is not indicated, in that case, according to Abû Hanifa, the dedication is not sufficient. But according to Abû Yusuf and Mohammed, it is good, and the pathway will be implied by the permission to pray.

The public do not acquire any right in a private mosque without special permission.

Accordingly, if a man were to build a mosque inside his house, it will not become a public mosque, subject to the rules governing a public religious institution, unless permission is granted to the public to come into the place. It is not necessary that such permission should be given in express terms, but, without an actual or constructive permission, a mosque created within a private building will not become a public mosque so as to entitle the public or any section of the public to claim the use of it. At the same time, a private mosque, if the dedication is in other respects valid, will constitute a good *wakf* so as to exclude the rights of the heirs over it. Where prayers have been once offered, it is not necessary to prove an express dedication. The very fact of the prayers being offered in it will imply a valid and good dedication.

According to Abû Yusuf, the *kawl* alone of the wâkif, or a declaration on his part that the land or premises is dedicated is sufficient: For example, if he declare that a particular building is constituted into a mosque, it would be a valid dedication, even though prayers may not have

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been offered in it. This is the accepted doctrine, as stated in the *Durr-ul-munteka*, the *Durrur*, the *Vikáyah* and other authorities.[1]

When the dedication of a mosque is effectuated by the offering of prayers, some lawyers have held such prayers should be with *azán*[2] and *ikámat*.[3] The reason of this condition is stated in the following terms :—"as delivery of possession in the case of a *wakf* is deemed necessary, though Abû Yusuf holds a contrary opinion, the nature of the delivery depends in each case upon the nature of the specific thing, for example, the delivery of a cemetery is by the burial of *one* person; of a tank or reservoir by *one* person drinking there; of a guest-house (*musáffir-khâneh*, traveller's house) by *one* way-farer or traveller alighting there. Similarly, as the purpose of a mosque is that people should pray there in *jâmaet*,[4] it is required that where there is no express dedication, prayers should have been offered there with the *azán* and *ikámat*."

But when one man acts both as muezzin[5] and imam[6] his praying alone is sufficient.

Prayers offered once in a mosque constitute a valid dedication.

If prayers are offered once in a mosque it is sufficient to constitute a good dedication. But should the wâkif alone pray in it, that would not be sufficient.

According to Kazi Khan, "the delivery of possession as regards a musjid is complete when only one person has prayed in it with *azân* and *ikâmat*. The view universally adopted is that prayer offered by one person in a mosque is sufficient to constitute it a public mosque devoted to the service of God, for a mosque belongs to the Deity and there affixes to it a right of the Mussulmans in general, and one person can be a proxy for the establish-

[1] Radd-ul-muhtar III, p. 572.
[2] The call to prayers.
[3] The necessary genuflexions.
[4] In assemblies.
[5] The person who calls to prayers.
[6] One who leads the prayers.

ment of the right of the Creator and the public. According to Abû Yusuf, consignment is not necessary for the validity of any dedication whether it be a mosque or any other *wakf*. Therefore, if a person create a mosque and give permission to people to pray therein, it is an absolute *wakf* and this opinion we adopt." Lecture VII.

Should a mosque be consigned to a mutwalli but no prayers be offered therein, it would be a valid dedication, though *Shams-ul-aimmah-Sarakhsi* holds a contrary opinion.

When a person has erected a public reservoir, fountain or cemetery, according to Abû Yusuf "whose opinion we follow," the *wakf* cannot be revoked. The burial of even one man in a cemetery is sufficient to constitute it a *wakf*, so the staying of one *musâffir* in a *musâffir-khâneh* makes the *wakf* irrevocable.

The general result of the above principles may be summed up in the following terms :—where effect has been once given to a dedication in the mode which is natural to the particular dedication, the *wakf* is complete and irrevocation. For example, the special purpose of a mosque is that people should perform their devotions there; of a cemetery, for dead persons to be buried, of a reservoir or tank, to supply water to those who use it &c., so according to the accepted doctrine of Abû Yusuf, even where there is no evidence of an express dedication in words, if it appears that one single individual (other than the grantor) has offered his prayers at the place, or one single person has been buried in the cemetery, or one person has drunk at the fountain, the dedication for the specific purpose must be regarded as complete. Such use of the subject of the *wakf* being in conformity with its avowed or ostensible object should be considered as conclusive of the dedication.

LECTURE VII. A person has a piece of land and permits people to pray thereon without any restriction or limitation as to the time of prayer or the number of people who should pray there. After his death that land will not form a portion of his inheritance. But if the permission was limited to a particular occasion or to a fixed period of time, the land will continue to be his inheritable property, for the limitation of time or occasion rebuts the presumption of absolute *wakf*.

A place where the *namâz-i-îd*[1] or *namâz-i-janâza*[2] is usually performed is subject to the rules of a *musjid* according to Kazi Khan and Asaâf.

If a person were to say "this room of mine I have set apart for supplying oil to the lamps of a certain mosque," and add nothing further—then according to Fakîh Abû Jâfar, the room becomes *wakf* for the mosque in question, if it is made over to the mutwalli and the *fatwa* is according to this opinion.

If a person make a *wakf* of his land to a mosque and consign it to the mutwalli of the mosque, it is lawful and cannot be revoked.

If a person were to bestow money for building a mosque or for the "affairs" of or the support of the mosque it is valid upon delivery.

If a person make a *sadkah* of his house for a mosque or for the benefit of Mussulmans, it is lawful and the *fatwa* is according to this.

A *wakf* for the repairs of mosques and graves is lawful for it implies perpetuity.

A sovereign cannot give any portion of the land acquired by treaty and negotiation to be converted into a

[1] Prayers offered on the occasion of the two Îd festivals, being after the *Îd-i-fitr* and the *Îd-ul-uzha* or *Bairam*.

[2] Funeral prayers.

mosque without the consent of the owners, but he can give any portion of the land acquired by war, provided it does not interfere with the rights of way possessed by any individual. Lecture VII.

If a person erect a mosque but appoint nobody as the mutwalli thereof, the *towliut* or governance remains vested in him. This is according to Hillal and Nâtek.

The *Ahl-i-muhulla*, *i. e.*, the people of the quarter may lawfully enlarge or reconstruct a mosque and supply it with better articles at their own expense, but not at the expense of the mosque unless the Kazi's permission is obtained to that effect. Should the *ahl-i-mahulla* wish to improve the mosque, with or without the consent of the Kazi, the heirs of the appropriator will not have any right to object unless it is patently contrary to the wishes of the wâkif.

Frequently, rooms are set apart in private residences for family prayer, or for the performance of the Moharram ceremonies. Rooms thus set apart do not come within the designation of *wakf*, and are not subjected to the rules governing endowed property, though often their owners have endeavoured to avoid execution of decrees for private debts by urging that the property was *wakf* dedicated to the private mosque or imambara. In many cases, however, distinct apartments are reserved for the performance of the religious ceremonies, like Kerbelai Mohammed's Imambara in Calcutta. Often, they have an entrance separate from that of the private residence, and in all respects fulfil the condition laid down by Kahastâni, who declared that, where the mosque was so intermixed with the private property or residence of the *wâkif* as to render differentiation necessary, the *wakf* premises should be distinctly indicated. In these cases,

LECTURE VII. there can be no question as to the apartments constituting a valid *wakf*. As a matter of principle, however, the law disfavours the dedication by way of *wakf* of one portion of a private residence whilst the other portion is in the occupation of the wâkif. For example, the dedication of the upper or lower storey of a building as a mosque is not considered valid, unless, owing to the crowded condition of the locality, it has become customary to constitute such mosques. Both Abû Yusuf and Mohammed recognised the lawfulness of such dedications in Bagdad and Rai, on account of the dense population in those cities in that century. It must not be inferred from the above, that there is any bar to the temporary conversion, or use by any person, of a portion of his private residence as a place for family prayer or religious worship. The rule is, that unless certain conditions are complied with, the apartments will not be subject to the law of *wakf* and will continue to form the private property of the individual. But where the whole building is constituted *wakf* for a mosque, imambara or madrassa and a portion of the building is used for the specific purpose of the *wakf*, and the remainder for the use of the servitors of the institution, or for letting out to people as a source of income to the *wakf*, the dedication is valid. When the wâkif himself purports to occupy a part of the building as mutwalli, it will depend upon the circumstances whether the dedication was *bonâ fide* or nominal. If the *wakf* is real, the mere fact of the *wâkif* occupying some portion of the building as mutwalli will not render it invalid.

In the Hedâya it is stated that Abû Yusuf and Mohammed have held the dedication of the central hall of a house for the purpose of a mosque to be valid. The Radd-ul-Muhtâr doubts the correctness of the report.

Where a mosque has fallen into ruin and it is not known who had erected it, the *ahl-i-mahulla* can sell the materials, presumably with the sanction of the Kazi, and apply the proceeds to the building of another mosque. A well can be dug in a mosque if it is to its benefit. The wâkif cannot let for hire for his own purposes any portion of the mosque premises. When a mosque has ceased, the wâkif cannot make use of it for any other purpose. "No profit should be derived from a mosque nor can it be leased or turned into a private abode." LECTURE VII.

According to Abû Hanifa and Abû Yusuf, the land which has once been dedicated to a mosque continues *wakf* even though it become waste and the building fall into ruin; and the *fatwa* is according to their opinion. And Abû Yusuf further holds, that with the permission of the Kazi, the ruined or waste portion may be sold and applied towards the construction or maintenance of any other mosque nearest to the disused mosque. "And the same principle is applicable to any other religious or charitable institution."

According to the Sharh-i-Multeka,[1] when the purpose of a trust fails it is lawful to apply the income of the trust-property to an object nearest in its nature to the original purpose, *jins-i-karîb*. For example, if the object of a *wakf* is a *hauz*, the income may be applied to a tank or canal; if it is a mosque, the income is to be applied to another mosque, or to fasting, prayers &c.[2]

Shams-ul-Aimmah-al-Halwani has declared that when

[1] Mohammed seems to have held that a ruined mosque reverts to the wâkif and Kazi Khan mentions that "the *fatwa* is with Mohammed." But the *Bahr* explains the difference thus :—"the articles in the disused mosque go to the wâkif, but the mosque and land remain *wakf* perpetually, as Abû Yusuf holds, and cannot revert to the appropriator or his heirs to become their heritable property."

[2] Radd-ul-Muhtâr, III, p. 574.

LECTURE VII. a *hauz* (reservoir) or mosque becomes ruined and nobody uses it, the Kazi can direct the application of its materials to another *hauz*, or mosque. "In these times," says the author of the Radd, "it is essentially necessary to adopt the views of Imam al-Halwani, who authorises the Kazi to give permission to apply the materials belonging to a mosque which has fallen into ruin to another which is in use.[1]"

The wâkif can reserve to himself, at the time of the dedication, the power to alter the beneficiaries of the trust or their interest in it. He cannot do so afterwards. "The wâkif," says the Radd-ul-Muhtâr, "has no power to alter or change the conditions (provisions) of a *wakf*, unless he has expressly reserved to himself the power of doing so.[2] If he has reserved to himself the power of adding to the beneficiaries or removing any person from that category, or of removing the mutwalli from his office, it will be lawful for him to do so. No alteration, however, can be made in the nature or character of the *wakf*. Similarly, it is not lawful for the mutwalli to go beyond the conditions laid down in the wakfnamah. A condition in the wakfnamah, to the effect that the mutwalli shall have the power of increasing the allowance of anybody or reducing it or adding anybody or removing any one is lawful. At the same time, the *maslihat-i-wakf* (the policy of the *wakf*) is to be kept in view.[3] "If a person," says Kazi Khan, "in good health make a *wakf* of land for the indigent and deliver it over to a mutwalli, and at the time of his death direct his executor

[1] Radd-ul-Muhtar, p. 575.

The principle would apply to the application of the income also.

[2] Comp. Hedaitoonissa *v.* Afzal Hossain, 2 All. H. C. 420.

[3] *Maslihat* here means the policy or purpose. What is intended to be conveyed is undoubtedly this, that in any alteration which may be made, the original purpose or object or policy of the trust should not be ignored.

to pay out of the proceeds thereof so much to so and so, that would not be valid, for he had parted with his right over the proceeds at the time of the *wakf*. But he can do so, if at the time of dedication he reserved to himself the power of giving directions for the application of the proceeds." Lecture VII.

Nor can the wâkif, who devotes property to charitable or other uses and transfers the proprietary right therein to a trustee, take it back at his pleasure from the trustee whom he has constituted the owner and give it to another person, unless on the creation of the trust he reserved to himself in express terms the right to do so.

"When there are two *wakfs* and of both the wâkif is the same and the purpose the same, but owing to certain calamities, the income of one has diminished whilst from the other a balance is left (over and above the expenditure,) the judge has the power to direct that the allowances of the servants of the first *wakf* may be made up from the balance of the income of the second." But the Kazi is not invested with this power, if the purpose of the two *wakfs* is different. "For example, if a man make two dedications for a mosque, one for its building and the other for the imam and the muezzin, and, owing to a decrease in the profits of the second *wakf*, the imam and muezzin cannot be employed, then it is lawful for the Hâkim, in consultation with the leading people of the *mahulla*, to direct that the allowance of these officers should be paid out of the balance left from the *wakf* for the building, provided the wâkif is one and the same." The mutwalli, though he be the trustee of both endowments, cannot of his own motion apply the balance of the proceeds of one *wakf* for the maintenance of the people provided for in the other. He must apply for and obtain the sanction of the judge.

LECTURE VII. Where several *wakfs* are attached to one mosque, the mutwalli or manager may keep the income of all together, in fact keep a joint account, and if one shop attached to the musjid has fallen into disrepair, there is no objection to its being repaired with the income of another shop belonging to the same mosque.

If a person appropriate ground for the purpose of erecting a mosque he cannot afterwards resume or sell it, neither can it be inherited because this ground is altogether alienated from the right of the individual and appertains solely to God. The reason of this is, that all things whatever are originally the property of the Almighty. When, therefore, the individual relinquishes his right in the ground, it reverts to its original state, and his power over it terminates in the same manner as a master's power over a slave terminates in consequence of manumission and cannot be resumed.

SECTION IV.

DEDICATIONS TO AQUEDUCTS, INNS, &c.

According to Abû Yusuf, a dedication to any object of utility is effectuated by the *kawl* of the wâkif, as in the case of a mosque. For example, when a person erects an aqueduct for Mussulmans, or an inn for the occupation of travellers, or a caravanserai, or constitutes his land into a cemetery, the dedication becomes complete upon the declaration of the wâkif and all his right of property ceases therein.[1] "According to Mohammed, it abates when people have used the aqueduct or have occupied the inn or caravanserai, or buried in the cemetery, and it

[1] According to Abû Hanifa, the right of the wâkif ceases, on the judge making a decree, or, if the appropriation is by way of a bequest, upon the death of the wâkif.

is sufficient if one person do so."[1] The rule is the same as to wells and cisterns, and if they are delivered to a superintendent, the appropriation is valid in like manner. It is stated in the Mabsût that the *fatwa* is according to the disciples by general consensus. Any one can drink from the wells and cisterns and water his cattle and camels at them and also use the water for ceremonial ablutions. In the use of all such objects of utility as above-mentioned, there is no difference between the rich and the poor, and it is lawful for all alike to put up at inns and caravanserais and to drink from aqueducts and bury in a cemetery. But the income of a mansion appropriated for *ghâzis* or religious warriors can be taken only by those of their number who are necessitous. When a mansion is appropriated for the residence of pilgrims, mere wayfarers have no right to occupy it, and when the days of the season have passed, it should be let and kept in repair out of the rents and the surplus, if any, distributed among the poor.

A road or way is validly dedicated by the owner of the land declaring in the presence of witnesses that he has constituted it as such. But those lawyers who consider consignment necessary to the completeness of a *wakf* require that one person should pass over the way, in order that it may serve as evidence of user. According to Hillal, the same rule applies to a bridge. Declaration alone (according to Abû Yusuf,) or user by one individual extinguishes the right of private property over such objects.[2]

"When a body has been buried in the ground, whether for a long or short time, it cannot be exhumed without some excuse. But it may lawfully be exhumed when it appears that the land was usurped, or another is entitled to it under a right of pre-emption. Auzujundee being

[1] Alamgiri, II, p. 554. [2] Alamgiri, II, p. 556.

Lecture VII. asked with regard to a musjid for which there no longer remained a congregation and all around it had gone to decay, whether it was lawful to convert it into a cemetery, answered 'No'; and being asked with regard to a cemetery in a village, where it had gone to decay and there remained in it no traces of the dead not even bones, whether it was lawful to sow the land and take its produce, answered 'No', for in legal effect it is still a cemetery."

"A man makes his land a cemetery or an inn—the khiraj abates, if the land were khirajee and this is correct."

"When a woman has made a cemetery of part of her land, divesting herself of the property and has buried her son in it, but the piece of land is unfit for a cemetery by reason of an overflow of water upon it, and she wishes to sell the land, if it be still in such a state that people desire to bury their dead in it she cannot sell it, but if they have no such desire she may. When she has sold it the purchaser may order the removal of her son's body from it."

"A man having dug a grave for himself in a cemetery, can another bury his dead in it? If there be space in the cemetery, it is proper that he should not interfere with the grave, but if there is no other space he may bury his dead in it. And the case is like that of a man who has opened out his prayer-carpet in a musjid, or put up in a caravanserai when another comes, and if there is space enough for him he is not to molest the other."

CHAPTER VIII.

Section I.

THE MUTWALLI.

It is lawful for the wâkif to reserve the *towliut* (the governance of the trust) for himself. And where a *wakf* has been created, but the wâkif has appointed no trustee or mutwalli for the administration of the trust, nor has expressly reserved the *towliut* for himself, the office would nevertheless appertain[1] to him *quâ* wâkif.

Lecture VIII.

Power of appointing the mutwalli rests primarily with the wâkif.

He has the power of appointing a mutwalli during his lifetime whenever he likes. Should he die without making any express appointment, the power devolves upon his executor. "If there is no executor then the right of appointing a mutwalli is in the hands of the judge."

The mutwalli can be removed for malversation or breach of trust which must be proved;[2] mere imputation is not sufficient to justify his removal. If a mutwalli with funds in his hands neglects to repair the *wakf* premises and allows it to fall into disrepair, it amounts to a breach of trust, for if he knowingly and intentionally causes damage or loss to the *wakf*, or if he misdeals with the trust property he must be removed from his office.[3]

If a mutwalli takes up his abode in the *wakf* building without any provision to that effect in the deed of dedi-

[1] Comp. *Advocate-General* v. *Fatima Sultani Begum*, 9 Bom. H. C. R. p. 19.

[2] *Mohammed Sadik* v. *Mohammed Ali*, 1 Sel. Repts. p. 17; *Hedait-unissa* v. *Syud Afzul Hossain*, 2 N. W. P. p. 420.

[3] *Syud Imdad Hossain* v. *Mohammed Ali Khan*, 23 W. R. p. 150.

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cation, or without the permission of the Judge, his conduct amounts to misfeasance.

When the wâkif himself holds the office of mutwalli, and is found guilty of misfeasance or breach of trust, he can be removed, whether there is a condition to that effect in the wakfnamah or not. Unfitness to carry out the duties of the trust is a cause for removal from office.

Any person who is trustworthy and otherwise qualified to discharge the duties of the office may be appointed mutwalli. "In this respect men and women are alike," *i. e.*, a woman may be appointed a mutwalli in the same way as a man.[1] Sectarian and religious differences form no disqualification, and accordingly, the fact that a person is a Shiah does not disqualify him for the superintendence of a *wakf* made by a Sunni.[2] As long as a person can discharge the duties of the trust personally or through a deputy, he or she is qualified to hold the office of *towliut*.

But where the mutwalli has to perform religious duties in connection with the *wakf*, a woman cannot be appointed to the office. For example, if the mutwalli is also the superior of a religious establishment, and, as such, has to officiate on occasions of religious festivals, a woman, by her sex, is precluded from holding the *towliut*.[3] Such superiors in India are called *sajjâda-nashins*. [*Sajjâda* is the carpet on which prayers are offered; and *nashîn* is the person seated thereon.] Similarly, if the *wakf* relates to an institution where services special to one sect or one religion are held, a member of another sect or creed would

[1] *Doedem Jaun Bibi* v. *Abdullah Barber*, 1 Fulton, p. 345; *M. S. Hyati Khanum* v. *M. S. Koolsum Khanum*, 1 Sel. Rep. p. 217; *Hussaini Bibi* v. *Hussan Sharif*, 4 Mad. H. C. R. p. 23.

[2] *Doyal Chand Mullick* v. *Syud Keramat Ali*, 16 W. R. p. 116. A person convicted of any ordinary offence, as defamation, abusive language &c., is not considered unfit.

[3] 6 Sel. Reports, p. 22.

not be ordinarily oppointed for the *towliut* of such an institution.

As regards the mutwalli who becomes unfitted to hold office by breach of trust, he is to be removed from his office, but he does not cease to hold office by the mere commission of misfeasance. So that until he is removed, acts committed by him which are otherwise lawful, will be valid until set aside in due course of law.

The mutwalli should be (1) major (*bâligh*) and (2) possessed of understanding (*âkil*).

Freedom and Islam are not necessary conditions.[1]

If a minor is appointed as mutwalli or as executor, "according to analogy," the appointment may be regarded as invalid, but legally it will remain in abeyance until he attains majority, when the *wilâyet* (mutwalliship) would be transferred to him.[2]

The conditions for the *towliut.*

"If the executor be a slave, then, according to both analogy and law, the appointment is valid, as the capacity to discharge the duties of the executorship or mutwalliship is not wanting in him. So also if a Zimmi or non-Moslem fellow-subject is appointed." But the Kazi is entitled to remove them from their office, on the ground that from their position they are unable to discharge their duties satisfactorily.

A minor mutwalli cannot appoint a deputy in his place, if he is the sole mutwalli.

If a minor is appointed a mutwalli, and no adult is associated with him, the Kazi shall appoint some person to do the work until the minor attains majority. If there is an adult associated with the minor, the Kazi may appoint some person to represent the minor and act jointly with the co-mutwalli, or may empower the adult mutwalli to act for the minor.[3]

[1] From the Asaâf. [2] Radd-ul-Muhtâr, III, p. 554. [3] *Ibid*, p. 555.

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The Kazi has the power of removing a mutwalli for breach of trust even though the appropriator should have made it a condition that there should be no such power.

Without embezzlement or breach of trust proved against the mutwalli, the Kazi cannot remove him from his post given to him by the *wakfnamah.*[1]

The dismissal of the mutwalli.

In the *Jáma-ul-Fusulain*, it is stated that "when a mutwalli has been appointed by the *wâkif* or by any of the constituted judges, he cannot be removed without any of those causes which justify his removal, that is, manifest breach of trust or misfeasance and the like causes. In the terms 'like causes' appear to be included his capacity to discharge the duties of the office or immorality."[2]

If among the relatives or neighbours of the *wâkif* no person can be found willing to undertake the work of *towliut* without a remuneration, and there is an outsider willing to do so, then his appointment would depend upon the Kazi's discretion and he must judge who is the best person to be appointed.[3]

Persons who get an allowance from the *wakf* shall not be deprived of their *wazifa* unless they are proved to be guilty of some offence which entails this penalty.[4]

A student who has been absent for three months may not be deprived of his room and allowance on account of his absence alone.[5]

In the *Ashbâh* it is laid down that if the sovereign himself were to appoint a person as a teacher who is not competent, he may be removed, *for the act of the Sultan must not be unreasonable or improper.* "A king appointing an incompetent person," says the *Bazâziah,* "does

[1] *Ibid*, III. p. 596.
[2] *Ibid*, III p. 597.
[3] *Ibid.*
[4] Radd-ul-Muhtâr, III, p. 597.
[5] *Ibid.*

two wrongs, first, that by appointing an incompetent person, he does an injustice to a competent person; and (2) that he does an injustice to the public by appointing one who was not entitled to the office."[1]

A mutwalli cannot give up the office of *towliut* of his motion; he must obtain the permission of the Kazi to retire from his office. Some jurists have, no doubt, held that a mutwalli can resign his post in favour of another, but they have also held that the latter will not become mutwalli until his appointment has been sanctioned by the Kazi, who is not bound to appoint him to the office. In the *Bahr*, it is laid down authoritatively that a mutwalli cannot appoint another in his place unless he is on his deathbed.[2]

If an appointment has once been made validly, no other person can be appointed as long as the former appointment lasts.

If a mutwalli resigns his post in favour of another in lieu of some pecuniary consideration, and the latter is not appointed by the Kazi, he can proceed against the quondam mutwalli for the money paid to him, though such "payment was illegal." Those who hold such payments to be legal are a few modern jurists, but it is against the true construction of the law and absolutely immoral.[3]

[1] *Ibid.*

[2] 1 Sel. Reports, p. 17. "A superintendent may at his death commit his office to another in the same way as an executor may commit his to another. But when the appropriator has assigned some particular property for the superintendent, it does not belong to the person to whom the office has been bequeathed; and the matter must be submitted to the judge, in order that he may assign for him the hire or salary of similar work, unless the appropriator had assigned the allowance for every superintendent. A superintendent, while alive and in good health, cannot lawfully appoint another to act for him, unless the appointment of him were in the nature of a general trust;" Baillie, p. 604.

[3] Radd-ul-Muhtâr, p. 598.

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SECTION II.

THE APPOINTMENT OF THE MUTWALLI.

The appointment of the mutwalli.

It would appear, that at one time attempts were frequent on the part of the servitors of charitable endowments to discharge their duties by substitutes. The allowance fixed for the officers were drawn by them, whilst a small honorarium was given to their substitutes. The legality of such conduct seems to have given rise to considerable discussion among the early Mahommedan jurists; but the more modern lawyers are generally agreed in the opinion that the appointment of a substitute is not lawful, unless there is any just reason for it. A female mutwalli, who is, by reason of her sex, unable to discharge all the duties of her office, is authorized to appoint a deputy. Similarly, where the disqualification is temporary, and is caused by illness or absence "on lawful grounds," the work may be performed by a substitute appointed by the superintendent or the Kazi. Where such appointment is made, the substitute is entitled either to the whole allowance or a portion thereof, in accordance with the arrangement made between him and the incumbent. Ibn-i-Shibli, has stated in his *Fatâwá*, that when a mutwalli has become incapable from weakness to superintend the work personally, he may appoint a substitute or deputy to help him in the management, but the responsibility would continue to rest with him, and the substitute will only obtain his allowance from the mutwalli.[1] The mutwalli cannot however, assign or transfer the office to any one, or appoint another during his lifetime unless his own powers are "general."[2]

[1] See *Shah Mohinuddin Ahmed* v. *Elahee Buksh*, 6 W. R. 277.

[2] Radd-ul-Muhtâr, III, p. 637. See *Wahid Ali* v. *Ashraf Hossain*, 10 C. L. R. p. 529.

The power of appointing a mutwalli rests primarily with the wâkif and, in his absence, rests with his *wasi* or executor, "because he is the wâkif's *locum tenens*." An executor appointed only with reference to, or in respect of the *wakf* properties would be a general executor, though Abû Yusuf apparently seems to differ in this view from the other jurists. According to the Asaâf, if a man were to appoint first a mutwalli, and then an executor (in respect of the same *wakf*,) both will be mutwallis unless their duties are specified.

Advocate General v. Fatima Begum.

In the case of the *Advocate General* v. *Fatima Begum*,[8] it was held that, according to Mahommedan Law, the appropriator has a right to reserve the superintendence of the *wakf* to himself or appoint some one else. But when he has specified the class from whom the manager is to be selected, he cannot disregard his own trust-deed and appoint a person not answering the proper description he has indicated by the provisions of the wakfnamah, and his right of nomination of the person to succeed to the management on his death must be confined to the class mentioned in the wakfnamah. The term *akriba* though more properly confined to relations by blood, will, when the context shows that it was intended to be used in a wider sense, be so extended as to include relations by affinity, but the wife or widow of the founder is not included among his *akriba*.

Abû Yusuf holds that if a wâkif appoints a mutwalli during his lifetime, without mentioning that such appointment should continue in force after his death, the mutwalli would vacate his office on the death of the wâkif. But this opinion has not been adopted. The rule of law is, that when an appointment is made without mentioning the time for which it is made, it would not fall to the ground on the death of the appointor.

[8] 9 Bom. H. C. Reports, p. 19.

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In the *Tâtâr Khâniah* it is stated that if the devotees or congregation of a mosque appoint a manager or mutwalli, it is valid according to the ancient jurists, but it is preferable to obtain the sanction of the Kazi. The moderns are, however, unanimously of opinion that "in these days" it is preferable not to inform the Kazi, for it is known how covetous they are of the property of *wakfs*. In the same way, the ordinary beneficiaries who obtain allowances from the *wakf* are entitled to, if they are *saleh* (pious) and qualified to do so, to appoint a manager.

Should a wâkif appoint a *wasi* at the time of his death and mention nothing about the provisions of the *wakf*, the *wasi* will become the mutwalli until he appoints another to discharge the duties of the *towliut*.

An executor appointed by the Kazi occupies the same position as one appointed by the deceased, except in certain matters.

A derivative executor occupies the same position as the executor of the testator.[2]

According to Abû Yusuf if a *wasi* is appointed for a *wakf*, the *wasi's* functions are restricted to the *wakf*; and Hillal agrees with Abû Yusuf. This view is stated in Kazi Khan, and it is also stated that Abû Hanifa agrees with Abû Yusuf. Mohammed differs, and his opinion seems to be generally in force.

"If a person appoint a mutwalli and then appoint an executor, both will become mutwallis thereof, unless the functions are distinctly specified." In the Asaâf, the mode of specifying the functions is stated in this manner:—"the wâkif says his such a land is *wakf* and so and so is the mutwalli thereof, and, as regards all the rest of his property, so and so is the *wasi*. In such a case both the persons appointed have separate functions."

[1] Bahr-ur-Râik. [2] After the *Zâhir-ur-Rawâyet* and *Tâtâr Khâniah*.

In *Shah Ghulam Rahmutullah Sahib* v. *Mohammed Akber Saheb*,[1] the Madras High Court held that when property is devoted to religious charitable purposes, it is usual for the appropriator to lay down rules, for succession to the office of trustee, and upon those rules, whether they are in writing or have to be inferred from evidence of usage, the question of succession depends. Should no rules be laid down, the power of appointing is vested in the appropriator during his life, and upon his death, it is vested in his executor; or should he have left no executor, in the magistrate and sovereign power that is to say, in the court.[2]

When the wâkif has provided that the appointment to the *towliut* shall be made by his children and among his children, there are some who are minors, the Kazi may authorise those who are adults to make the appointment on behalf of the minors as well as their own, or may associate some person with them to represent the minors.

According to Abû Yusuf, the wâkif is entitled to make changes in the *touliut* even should he not have expressly reserved to himself the power of doing so.[3]

In the *Anfa-ul-wasâil* it is stated from *Khassâf*, that when a person has made a *wakf* of two pieces of lands, and appointed two mutwallis, and subequently at his death appoints Zaid as his executor, Zaid will be a mutwalli with them; and if Zaid appoints Amr as his executor, Amr's position will be the same as that of Zaid.

If a person appoint two executors one after the other

[1] 8 Mad. H. C. R. p. 63.

[2] *Mohammed Sadik v. Mohammed Ali*, Ali, 1 Sel. Rep. p, 17. *Mohammed Kesori v. Mohammed Shah Kiyamuddin*, 5 Sel. Rep. p. 133; *Advocate-General* v. *Fatima Sultani Begum*, 9 Bom. H. C. R. p. 19; *Phate Sahib Bibi* v. *Damodar Premji*, I. L. R. 3 Bom., p. 84; *Agha Mahomed Eusoof Mushadee* v. *Abdool Hossain Khan*, S. D. A. 1857, p. 640; *Het Koonwar* v. *Chutterdharee Singh*, 13 W. R. 396.

[3] But see *seq*.

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without removing the first, both of them become executors, for "among us," an executorship does not fall to the ground of itself. The appointment of a second mutwalli by the Kazi is different from the appointment of a second mutwalli by the wâkif, for, in the former case both appointments are valid, and where both appointments are made by the Kazi, the second appointment invalidates the first, provided the first mutwalli becomes aware of the second appointment. It is not expedient to appoint to the office of mutwalli one who is a seeker after it, but it is not unlawful.

When the wâkif dies without appointing a mutwalli or leaving an executor, in that case the Kazi will have the power of appointing the superintendent of the *wakf*; so also if the last incumbent in the office of mutwalli dies without appointing his successor or an executor, the appointment rests with the Kazi; the *fatwa* is according to this principle and the Allâmah Kâsem has decided according to it.

The last mutwalli has the power of nominating his successor only when the wâkif has made no provision regarding the succession to the office. If the wâkif has declared that the office shall descend in the lineal male line in a particular family, none of the incumbents will have the power of changing the course of descent. Or, if the wâkif has declared that after A, B should succeed to the office, A has no power to appoint C.[1]

Generally speaking, the power of directing the sale or mortgage of *wakf* properties is vested in the Chief Kazi. Nor has the Deputy Kazi the power of setting aside *wakfs*; the power to do so is vested in the Kazi who is especially empowered to that effect by the sovereign authority, or who is vested with the general power of administering the estate of deceased people, to guard over

[1] 1 Sel. Reports, p. 17. *Jâma-ul-Fusulain.*

the estates of minors, and to preserve charitable endowments. In the *Bahr*, however, it is stated that the appointment of Kazi carrries with it the power of appointing mutwallis, and administering *wakf* estates, &c.

As long as there is a relative of the wâkif in existence, a stranger should not be appointed mutwalli[1] for a relative is more benevolently disposed [towards the wâkif] and it is generally the intention of the wâkif that a relative should be appointed—[provided he is qualified for the office].

قوله وما دام أحد يصلح للتولية من اقارب الواقف لا يجعل المتولي
من الا جانب — المسئلة في كافي الحاكم ونصها و لا يجعل القيم
فيه من الا جانب ماوجد فى ولد الواقف و اهل بتية من يصلح لذالک
فان لم يجد فيهم من يصلح لذالک فجعله الى اجنبي ثم صار فيهم من
يصلح له صرفه اليه اهه ومفاده تقديم اولاد الواقف وان لم يكن الوقف
عليهم بان كان علي مسجد او غيره و في الهندية عن التهذيب
و الافضل ان ينصب من اولاد الموقوف عليه و اقاربه مادام يوجد
احد منهم يصلح لذلك اهه والظاهران مراده بالموقوف عليه من كان من
اولاد الواقف فلا ينافي ماقبله ثم تعبيره بالا فضل يفيد انه لونصب اجنبيا
مع وجود من يصلح من اولاد الواقف يصح فافهم ولا ينافي ذلك مافي
جامع الفصولمين من انه لو شرط الواقف كون المتولى من اولاده و اولادهم
ليس للقاضي ان يولي غيرهم بلا خيانة ولو فعل لايصير متوليا لانه فيما
اذا شرطه الواقف و كلا منا عند عدم الشرط و وقع قريبا من اواخو كتاب
الوقف من الخيرية من مايفيد انه فيهم عدم الصحة مطلقا كماهوالمتبادر من
لفظ لايجعل فتا مل و افتي ايضا بان من كان من اهل الوقف لايشترط
كونه مستحقا بالفعل بل يكفى مستحقا بعد زوال المانع وهو ظاهر ثم لا
يخفى ان تقديم من ذكر مشروط بقيام الا هلية فيه حتى لوكان خائنا
يولى اجنبي حيث لم يوجد فيهم اهل لانه اذا كان الواقف نفسه يعزل
بالخيانة فغيره بالاولى (تنبيه) قدمنا عن البيري عن حاوي الحصيري

[1] 9 Bombay H. C. Reports p. 19. Radd-ul-Muhtar, III, p. 636.

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The right of members of the wâkif's family to the office of *towliut.*

In the *Kâfi-ul Hâkim* the principle regarding the preferential right of the members of the wâkif's family to the office of mutwalli is thus stated:—"No stranger shall be appointed a mutwalli as long as there is to be found a descendant of the wâkif or a person belonging to his family *(ahl-i-bait)* qualified for the office; when no qualified person can be found among them, and the *towliut* is entrusted to a stranger, and subsequently a member of the wâkif's family is forthcoming who is qualified for the office, it shall be given to him." The purport of this is, that the descendants of the wâkif would be preferred (for the office of mutwalli) even though the *wakf* should not be for them, as in the case of a *wakf* for *masâjid* &c.

In the *Hindyeh*[1] it is stated from the *Tahzîb*, that it is preferable to appoint to the mutwalliship the descendant, if any, of the person for whom the *wakf* is made, provided he is fit for the office. And it is apparent from this that the person for whom the *wakf* is made implies a person who is descended from the wâkif. From the term "preferable," it is clear that the appointment of a stranger in the presence of a descendant of the wâkif is valid. This view is not contradictory of what is stated in the *Jâma-ul-Fusulain*, which amounts to this, that should the wâkif make a condition to the effect that his children and children's children should be the mutwallis of the *wakf* in succession to each other, in that case the Kazi has no power to appoint an outsider without finding any breach of trust on the part of the wâkif's descendant. Should the Kazi appoint an outsider to the office of

عن وقف الانصاري انه اذا لم يكن من يتولي الوقف من جيران الوقف
و قرابته الا برزق و يقبل و احد من غيرهم بلا رزق فللقاضى ان ينظر الا
صلح لاهل الوقف *

[1] The Alamgiri is meant here.

mutwalli, in supersession of a descendant of the wâkif without any lawful reason, such person shall not become mutwalli. Therefore, what is stated in the *Hindyeh* relates to a case where the wâkif has made no provision about the appointment of mutwalli from among his descendants. The author of the *Khairiyeh* supposes that the appointment of an outsider in the presence of a descendant of the wâkif is necessarily bad; this view is wrong as explained above. It is only where the wâkif has made a condition that the office shall be confined to the members of his family that the Kazi cannot appoint an outsider.[1]

But even where there exists a condition to that effect, an outsider may be appointed, if there is no fit and proper person to be found among the descendants or relatives of the wâkif, and a descendant or relative of the wâkif succeeding to the office of *towliut*, if he proves himself unworthy or commits a breach of trust, can be removed, and, in the absence of any other member of the wâkif's family qualified to take his place, an outsider can be appointed, for when the wâkif himself can be removed for breach of trust, *à fortiori* other people can be removed also for misbehaviour. In a case where a descendant or relative or a neighbour of the wâkif is not willing to accept the office without a salary, and an outsider is willing to accept it without a salary, the Kazi should see whose appointment would be most beneficial to the *wakf* and who is the fittest for the appointment.

Should the mutwalli in his lifetime and in health appoint another in his place, the appointment will be lawful and valid, if the mutwalli has obtained the *towliut* with that condition "in a general manner." In that case the mutwalli so appointing another person in his

[1] Radd-ul-Muhtâr, III, p. 636.

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place will not be able to remove the latter, unless the wâkif, in confiding the trust, empowered him to assign the trust to another, and also to remove the trustee.

As regards the appointment by the mutwalli of a *kâim mokâm* or substitute in his place, the restriction mentioned above refers to the appointment of a permanent and substantive substitute, who would occupy the position and exercise the full powers of the mutwalli, in fact succeed him in the office. Such an appointment can only be made by the mutwalli on his death-bed or in death-illness. This restriction does not apply to the appointment of a deputy or agent.[1] And in the *Fatah* it is stated

[1] 10 C. L. R. p. 510. See also 6 W. R. p. 277.

قوله اراد المتولي اقامة غيره مقامه - اي بطريق الاستقلال اما بطريق التوكيل فلا يتقيد بمرض الموت وفي الفتح للناظر ان يوكل من يقوم بما كان اليه من امر الوقف و يجعل له من جعله شيئا وله ان يعزله و يستبدل ولو جن انعزل وكيله ويرجع الى القاضي في النصب صحته وشمل كلام المصنف المتولي من جهة القاضي او الواقف كما في انفع الوسائل عن التتمة وقال وهوا عم من قوله في القنية للمتولي ان يفوض فيما فوض اليه ان عمم لقاضي التفويض اليه والا فلا فان ظاهره ان هذا الحكم في المتولي من جهة القاضي فقط (قوله و الصحة) عطف تفسير اراد به بيان ان المراد بالحياة ماقابل المرض و هوا لاما يشملهما فافهم و قوله ان كان التفويض و بالشرط عاما صح

قوله لا يملك عزله الخ - هذا ذكره الطرسوسي بحثا وقال بخلاف الواقف فان له عزل القيم وان لم يشرطه و القيم لايملكه كالوكيل اذا اذن له الموكل في ان يوكل فوكل حيث لم يملك العزل و كالقاضي اذا اذن له السلطان في الاستخلاف فاستخلف شخصا لايملك عزله الا ان شرط له السلطان العزل واطال في ذلك فراجعه ان شئت (قوله و الا) اي وان لم يكن التفويض له عاما لايصح و قوله فان فوض في صحته الاولي حذفه لان الكلام في الصحة و حينئذ فقوله وان في مرض موته مقابل لقوله

that the mutwalli is empowered to appoint such persons as deputies, as are able to discharge the duties connected with the office, or which are incumbent on the mutwalli. The mutwalli has the power of removing his deputy and appointing another in his place. If the mutwalli becomes insane, the appointment of his deputy becomes vacated of itself; and the Kazi becomes entitled to appoint a substitute for the mutwalli. This applies to all cases, both where the mutwalli has been appointed by the Kazi and by the wâkif.

Where the appointment of the mutwalli is "general,"[1] the mutwalli has the power of assigning the trust to another, not otherwise.[2]

Meaning of the term "general."

As regards the meaning of the term "general" the commentator seems doubtful. "Probably," he says, "it means that if the wâkif or Kazi make a condition, at the time of appointing the mutwalli, that he should have the power of transferring the trust to another and substituting that other in his own place, by a *sanad-i-wakf* or *wasiut*, should necessity arise for it, such a condition would carry with it the power on the part of the mutwalli to appoint another mutwalli during his lifetime. When he has once

في حياته و انما صح اذا فوض في مرض موته و ان لم يكن التفويض له
عاما لما في الخانية من انه بمنزلة الوصى وللوصى ان يوصى الى غيره
وسيذ كرالشارح فى كتاب الا قرار عن الا شباه الفعل فى المرض اخط رتبة
من الفعل في الصحة الا فى مسئلة اسناد الناظر نظره لغيره بلاشرط
فانه فى مرض الموت صحيح لا في الصحة كما فى التمتة و غيرها
و وجهه ماعلمته من انه بمنزلة الوصى ولماكان الوصى له عزل من
اصى اليه و نصب غيره اتجه قوله و ينبغى ان يكون له العزل والتفويض
كالا يصاء بخلاف الاسناد فى حال الصحة لانه فى حال الصحة كالوكيل
ولا يملك الوكيل العزل

[1] Radd-ul-Muhtar, III, p. 637. [2] Taken from the *Anfa-ul-wasâil*.

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exercised the power, he cannot cancel the appointment. If the appointment of the mutwalli, or the assignment to him of the trust, is not علی سبیل التعمیم or general in its nature as stated above, in other words when the mutwalli does not possess general powers, he cannot assign the trust to another "in health," whilst capable of discharging the functions of the office; but [if there are no provisions in the wakfnamah regulating the mode of succession,] he can appoint a successor in death-illness.[1] The reason of this is stated by Kazi Khan to consist in the fact that the mutwalli is in the position of an executor, and like an executor he has the power of appointing on his deathbed another executor in his place to perform the functions which appertain to him. As an executor has no power to resign the executorship which he has once accepted, without the permission of the Kazi, so a mutwalli cannot withdraw from a trust without such permission. The appointment of another mutwalli by one who does not possess general powers, without the leave of the Kazi, is tantamount to a withdrawal of the incumbent from office, yet he remains responsible, unless the appointment or transfer of the trust is subsequently confirmed by the Kazi.

When a condition is made in the wakfnamah that upon the death of each mutwalli, the power of appointing his successor will rest with the judge, a mutwalli cannot appoint a successor to himself either in health or illness. And upon the decease of each incumbent, the Kazi shall appoint a successor.

The wâkif has the power of removing the mutwalli only when he has reserved a power to that effect and the *fatwa* is according to this rule.

[1] 1 Sel. Rep. p. 17. See Appendix.

[2] Radd-ul-Muhtar, p. 638. There is a difference between Abû Yusuf

If the wâkif has appointed no mutwalli, and the Kazi has appointed one, the wâkif has no power to remove the person appointed by the Kazi.

When an allowance is fixed for a person in the wakfnamah, and it is declared that upon his death such allowance shall go to another, if the person for whom the allowance is fixed assigns his interest to a third person, upon the decease of the original beneficiary, the allowance shall go to the person appointed by the wâkif and not to the assignee of the original beneficiary.

If a person make a *wakf* and appoint Abdullah the mutwalli thereof, and declare that upon Abdullah's death, Zaid shall be the mutwalli, Abdullah has no power to devise the mutwallisship to another, and Zaid will be the mutwalli notwithstanding any appointment made by Abdullah. And Allâmahal-Hanouti has held that when a person has declared that the *towliut* of any *wakf* should be given to the "most discreet of his descendants; and one of them, being the mutwalli for the time, appoints his son-in-law as the mutwalli and dies, the *towliut* shall nevertheless go to such person among the descendants of the wâkif as fulfils the condition in the wakfnamah." Any appointment contrary to the terms of the *wakf* or conditions laid down by the wâkif are invalid. There is no authority to show that the servitors of the mosque can remove the mutwalli, though the mutwalli can remove them for unfitness or misconduct or any fault.[1]

and Mohammed on this point. Abû Yusuf holds that the wâkif is absolutely entitled to remove the mutwalli appointed by himself whether he has reserved the power or not. Mohammed differs, holding that it is only when the wâkif has reserved the power that he can remove the mutwalli, without any misfeasance; and the *fatwa* is according to Mohammed's view; *Tashih-ul-kudûri* by Allâmah al-Kâsem; see the case of *Hidayatunnissa* v. *Afzal Hossain*, 2 N. W. P. Rep. p. 420.

[1] Radd-ul-Muhtâr, III, p. 639.

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The person who builds the mosque has a better title to appoint its muezzin and imam than the congregation, but should the congregation appoint a better and more qualified person, their appointment would be preferred.

In the appointment of imam and muezzin to a mosque, when there is no mutwalli, the power of nomination and appointment is given to the wâkif's descendants and the members of his family, preferentially to others. This is the view stated in the *Ashbâh*.

In the matter of building and repairing a mosque the person who has erected the mosque, and his descendants, are preferred to the congregation or outsiders. This is according to the *Anfa-ul-wasâil*.

If the wâkif makes a condition that the administration should devolve on "the most intelligent" (ارشد,) it implies the most intelligent among his descendants; and according to a *fatwa* of Munla Abû Saood, if there are two of them equally intelligent, they both should be associated together in the office. In the *Nahr*[1], however, it is stated from the *Asaâf* that if the wâkif has declared that the *towliut* should be for the most qualified (افضل) among his children, and there are two equally qualified, the *towliut* shall go to the one who is the oldest in age, and in this there will be no distinction of sex. And if among the two, one is very pious and the other is best acquainted with the affairs of the *wakf* and its management, the *towliut* should be given to the latter, if he is trustworthy. The commentator adds that the *dictum* in the *Nahr* particularizes the view of Abû Saood, for it declares that when excellence is required to be joined with intelligence, and there are two equally intelligent and virtuous, regard is to be paid to age. And according to the *Bahr* (after the *Zahiria*,) if all the descendants are

[1] Nahr-i-Fâik.

equal in integrity and piety, in learning and uprightness and age, the one who is best acquainted with the affairs of the *wakf* and is most capable to discharge the duties connected with the trust, whether male or female, is to be preferred. According to the *Bahr*, *rushd* or intelligence refers to the ability to perform the work and honestly to discharge the duties of the office.[1] In the *Asaâf* also, it is stated that when two of the descendants are equally qualified, so far as the qualities of the mind are concerned, the *towliut* will go according to seniority; and the fact that one is a male and the other a female will make no difference. But the person best acquainted with the business of the *wakf* will be preferred. In the *Ismailya* there is a *dictum* to the effect that where two people are equally qualified in all respects a male is to be preferred to a female.

When the wâkif declares that the *towliut* should be vested in the "fittest" among his children, and there is no fit person to be found among them, the Kazi has the power to appoint a stranger to the office until such time as a proper person among the wâkif's descendants can be found. If among the children there is a properly qualified person and he is absent, and there is no one else among them to take his place until his return, the Kazi has the power to appoint a stranger to be his substitute until he returns to take the office. If there are two children, one more qualified than the other, the one who is the fitter of the two should take the office, and after him should come the other.

The words *nâzir*, *kyûm* and *mutwalli* used separately, convey one and the same meaning, *viz.*, the administrator of a trust.[2] But it often happens that at the time of appointing a mutwalli, the wâkif also appoints a nazir,

[1] Radd-ul-Muhtar, III, p. 666.

[2] Radd-ul-Muhtar, III, p. 667.

a supervisor over the mutwalli. In that case, the nâzir has no power over the disbursements, but his duties would be simply of a controlling and supervising character, and the mutwalli shall not make disbursements without the knowledge or permission of the nâzir. The same principle applies to a nâzir appointed over an executor; as a matter of fact, the principles which apply to the duties of mutwallis and nâzirs in the case of *wakfs* are taken from the principles of the law relating to the duties of executors.

Though there be a condition to the effect that the mutwalli cannot be removed under any circumstance, even though guilty of misconduct, the mutwalli can be removed if proved guilty of misfeasance.

The builder of a mosque is the person who has a preferential title to appoint the officers, such as imam, muezzin &c., for the service thereof, and this is the approved doctrine. If the person appointed by the wâkif is incompetent or unfit, the congregation have a right to select a more fit person.

The Kazi, as the general superintendent of all charities, in his capacity of the representative of the Sultan, has the power of empowering the mutwalli to grant leases for a longer period than provided for by the wâkif. If no term is limited by the wâkif, it is discretionary with the mutwalli to grant a lease for any term which may prove advantageous to the *wakf*. Generally, a lease of a house should not exceed a year, and of land a period of three years; but the application of the principle will depend on the proper discretion of the mutwalli, the requirements of the *wakf*, and the custom of the locality. The jurists of Balkh and Abû Lais have held that even when there is no restriction in a wakfnamah, the mutwalli should

not lease lands for more than 3 years without the leave of the Kazi.[1] And the *fatwa* is according to this view.

A person who alleges to be beneficially interested, jointly with others, in a *wakf* property, the character of which is in dispute, is entitled to sue for its recovery, if it is misappropriated, with the leave of the Kazi, without any difference of opinion. If he sues without such leave, there are two opinions regarding the question. But the more correct view is that he cannot sue for the possession of the property, because he is only entitled to an interest in its income. A person who is the sole beneficiary may sue without such leave.

When there are several people entitled to the benefit of a *wakf*, some of them may sue the others for embezzlement.

Some of the persons interested may sue on behalf of the entire body even without leave of the Kazi, when the property is admittedly *wakf*.[2]

A person who is only beneficially entitled in a trust-property has no power to lease the same, unless he is the mutwalli thereof, or has been empowered, in the absence of a mutwalli, to do so by the Kazi.

If the deed of *wakf* is lost and the conditions and the mode of disbursement connected with it are unknown, its application will be to such objects as are in accordance with existing usages and customs.

Property purchased by the mutwalli out of the *wakf* funds becomes *wakf* without any express declaration, subject to the same conditions as the original trust-property.

[1] The Kazi is the curator and guardian of the interests of persons who are dead or absent or unborn, of the poor, the indigent, as well as the custodian of the property of a deceased person and of things which are picked up.

[2] This branch of the subject will be more fully treated in a later chapter.

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But it may be sold or exchanged for some other property, in case there is any need for it, and such other property would be *wakf* similarly.

The salaries of the imam, khatîb, muezzin &c., which have already become due will be paid on the death of any one of them to their heirs. In the case of *wakfs* in favour of children, the heirs of the deceased beneficiaries are entitled to share in the rents and profits, which have been realized and are therefore distributable, or which are accruing.

If a student absents himself from the madrassa, he does not lose his former allowance which has already accrued due, nor his future allowance, if he has absented himself in the pursuit of learning (without severing his connection with his madrassa and with the permission of his master,) or has been absent for 15 days only on lawful grounds, that is, in search of livelihood; or has gone on hajj, but has not been away for more than three months.

Leave is allowed to the servitors of a *wakf* on lawful grounds, and they do not lose their allowance whilst on leave unless a deputy is appointed to officiate for them during their absence.

The Kazi has no power to fix allowances not provided for by the wâkif, but he can determine the amount of the allowances provided for by the wâkif. If there is a provision that the mutwalli should fix the amount, the Kazi has no power. The *Khair-ur-Ramli* has stated in his commentary[1] on the *Bahr* that the restriction on the powers of the Kazi refers to a case where the wâkif has expressly stated that the *wakf* is not public in its nature and the Kazi shall have no authority over it. "This of course refers to *wakfs* created by private individuals.

[1] viz. *the Khairiyeh.*

Royal *wakfs* are clearly subject to the jurisdiction of the Kazi."

In fixing the salary of the mutwalli, regard should be paid by the Kazi to the customary allowance at the time, but it should not exceed one-tenth of the income. "Of course," the wâkif can fix any amount, and even if it is more than one tenth it would be valid; but if he fixes too low a sum, the Kazi has the power upon the application of the mutwalli to fix a proper salary.

The mutwalli has no power to increase the allowance of the imam or khatîb. The Kazi has the power to increase the allowance, provided in his discretion it is necessary to do so for the benefit of the mosque, or when it is impossible to obtain a proper man to discharge the duties on account of the low salary fixed by the wâkif. And this principle applies to the appointment of every servant, *e. g.*, a muezzin, a muddaris &c. If these men cannot be had on the salaries fixed by the wâkif, the judge has the power of increasing their salaries from the balance of the fund. The Kazi has the power of making provisions regarding the application of the balance of the income, in consultation with the members of the grantor's family or the beneficiaries.

The Kazi cannot remove a mutwalli, whether appointed by the wâkif or himself, merely on the complaint of the *haqdars* (beneficiaries) but can do so upon proof of misfeasance or breach of trust.[1]

But though the Kazi has no power to remove the mutwalli merely upon the complaint of the *haqdars*, yet upon receiving a complaint, if he consider the complaint to be *boná fide* and reasonable he can associate another trustworthy person with the mutwalli and fix a remuneration

[1] Authority quoted is the *Jâma-ul-Fusalain.*

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for him, either out of the allowance of the mutwalli or from the general funds.[1]

Similarly the Kazi has no power to remove an executor appointed by the deceased merely on the complaint of anybody without proof.

Responsibility of the mutwalli.

Any loss sustained by the *wakf* through the wilful neglect of the mutwalli shall be made good by him. It is doubtful, however, whether a gratuitous mutwalli would be liable for any loss which is occasioned merely through neglect to the *wakf*.

A mutwalli cannot contract debts for the *wakf* unless they are made in consequence or in pursuance of the directions given by the wâkif. The mutwalli cannot create any charge on the *wakf* estate or incur liabilities for which the *wakf* estate might be liable, unless such charge is created or debt is incurred under express powers given by the wâkif. This restriction does not apply to the powers of the executor, for it is lawful for him to contract debts for the necessaries of the minors confided to his charge, and the infant and his estate would be liable for such debts as are incurred *bonâ fide* by the executor for the infant.[2] But the *wakf* cannot under any circumstance, in the absence of any provision in the wakfnamah to that effect, be made liable for any debt contracted by the mutwalli on his own responsibility. A debt contracted by the mutwalli is his personal debt. Should it become necessary to incur a debt for the *wakf* or to create a charge on the estate, the mutwalli can only do so with the sanction of the Kazi previously obtained.[3] This principle does not refer to such debts which, owing to the exigencies of society, must necessarily be contract-

[1] After the Khassâf and Anfa-ul-Wasâil.

[2] Radd-ul-Muhtar, III p. 649.

[3] According to *Abu Lais;* See *seq.* On alienations.

ed from day to day for the due discharge of the works of the trust; for example, a debt to the oilman for the oil to light the mosque, to the baker to supply bread for the students of a madrassa, all these can only be paid at periodical intervals. The *wakf* estate must remain liable for such necessary debts.

The mutwalli has no power to create an incumbrance on the *wakf* property without the sanction of the Kazi.

If the mutwalli has advanced money to the *wakf* estate for the purpose of protecting the interests of the *wakf*, he can repay himself out of the profits of the *wakf* property coming into his hands.[1] But when the mutwalli has any claim against the *wakf* estate for advances made by himself, he has to establish such claim by valid proof, otherwise it will not be maintainable. The mutwalli is, therefore, bound to keep clear distinct accounts of his expenses with vouchers and other proofs; in which case a claim for any credit given by the mutwalli to the *wakf* would be maintainable, and such advances will be liquidated out of the rents and profits of the *wakf* property. But the *wakf* estate cannot be *charged* with any debt either to the mutwalli or anybody else, without the sanction of the Kazi previously obtained.

Section III.

THE LEASE OF WAKF PROPERTY.

Lease of *wakf* property.

The jurist Abû Jafar[2] says that where the wâkif has made no provision in the wakfnamah about the grant of leases in respect of the *wakf* property, the mutwalli is authorised to grant a lease thereof, subject to the condition that he should not lease a house for a longer term

[1] Radd-ul-Muhtar III, p. 650. [2] Kazi Khan.

than one year (unless it is customary, or would be to the advantage of the *wakf* to do so;) for a long lease is apt to give rise to confusion in the enjoyment of rights. And he may not give a longer lease of land for cultivation on the average for more than three years, unless it is for the advantage of the *wakf*, and is done with the sanction of the Kazi. When there is a provision in the wakf-namah relating to the grant of a lease of the land for a term of one year, and the mutwalli grants a longer lease, the Kazi shall consider whether it is to the benefit of the *wakf*. If it be not, he can set it aside. The jurist Abû Bakr Mohammed ibn Fazl and Imam Abu'l Hassan Ali-as-Sugdi are agreed on this point. But the jurist Abû Lais makes no distinction between houses and lands and declares that a mutwalli may validly grant a lease for three years of all kinds of property without the sanction of the Kazi.

The judge, however, can authorise the grant of a lease for any term which may in his discretion be advantageous to the *wakf*.[1]

"If an executor or guardian leases the property belonging to his ward without the proper customary rent, or if a mutwalli acts in that manner in respect of *wakf* property, in all such cases, according to the illustrious Imam Abû Bakr Mohammed ibn Fazl, the lessee will be regarded as a *ghásib* (embezzler;) but Khassâf holds that he will not be treated as a wrong-doer but will be liable for the proper customary rent. And the *fatwa* is according to this latter view."

A lease given by a mutwalli is not cancelled by his death.

The lessee of *wakf* properties can plant trees or make

[1] See also *Dalrymple* v. *Khoondkar Azeezul Islam*, S. D. A., 1858, p. 586; *Shoojat Ali* v. *Zumeer-ooddeen*, 5 W. R. 158.

erections on the land leased to him, provided such act does not in any way injuriously affect the property, but he cannot dig a reservoir or tank; even the mutwalli's permission would justify his doing only such acts as are beneficial to the trust property.[1]

The lessee can remove such erections as he has built with his own money, provided their removal does not damage the property. If it does, the lessee will not be entitled to remove such erections.

Regarding erections on *wakf* lands, the following rules are applicable:—

"If the mutwalli of the *wakf* erects the building, with the property of the *wakf* or the income of the trust-property, the building becomes the property of the *wakf*, whether the erection be for the *wakf* or for himself, or whether it was erected generally without any specific purpose. If the erection was made with his own money or materials, but it is erected for the *wakf*, or *generally*, then also it belongs to the *wakf* property, unless the wâkif himself is the mutwalli and the erection is made without any expressed purpose, in which case it remains his property, as is stated in the *Zakhira*. If the mutwalli erects the building with his own money *for his own especial purpose and keeps evidence of the fact that it is erected for such purpose out of his own funds*, it will remain his property, and this is what is stated in the *Kunia* and *Mujtaba*.

When a person, other than the mutwalli, erects a building on *wakf* property, for the use of the *wakf* (though temporarily and with the object of taking it back), if the erection is made with the permission of the mutwalli, it becomes *wakf*. The same is also the case when the erection is made without the mutwalli's permission, but

[1] Radd-ul-Muhtâr, III, p. 650.

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for the use of the *wakf;* but, where the building is erected for the private purposes of the person erecting it, or where it is made generally without any expressed object, it will be lawful for him to remove it, provided no loss accrues to the *wakf* property in the removal. In the *Fatáwa-i-Kazi Khan*, it is stated that if a person plant trees in a mosque they become the property of the mosque. If a mutwalli were to lease the *wakf* lands to his father or son[1] it would not be valid unless the rent is higher than is usually current, as in the case of an executor, who cannot sell the property of a minor unless at a higher price.

If the wâkif has made a condition that no lease shall be granted for more than one year, and it appears that a longer lease is good for the trust estate, then the mutwalli should apply for leave to the Kazi to grant a longer lease and should act according to the Kazi's directions.

Section IV.

THE RULES OF TOWLIUT ACCORDING TO KAZI KHAN.

According to Abû Yusuf, consignment to a mutwalli is not necessary to constitute a valid *wakf*, though it is according to Mohammed. Abû Yusuf holds that the *towliut* remains for the wâkif even though he has made no condition to that effect, unless he has appointed somebody else.

The jurists of Balkh have adopted the opinion of Abû Yusuf, and our jurists (that is of Bokhara) have adopted the views of Mohammed.[2]

[1] The principle would include any relative or connection.

[2] The jurists of India follow Abû Yusuf.

When a person makes a *wakf*, and at the time of his death appoints a person to be his executor without mentioning anything about the *wakf*, such executor shall be nevertheless the mutwalli of the *wakf*. If a person appoint an executor solely for the *wakf*, according to Abû Yusuf, he will be executor of the *wakf* alone, though according to Abû Hanifa he will be an executor generally.

If the wâkif makes a condition at or before the delivery of the property to the mutwalli, that he reserves to himself the power of removing the mutwalli or changing the property, in that case he may do so, but not otherwise according to Mohammed.[1] According to Abû Yusuf he may do so without any reservation of power.

If a person make a *wakf* and appoint another as the mutwalli thereof, and also make it a condition that such mutwalli shall not have the power of appointing by testament his successor, such condition would be valid.

If a man in health were to make a *wakf* of his land for the poor and consign the same to a mutwalli; and subsequently at the time of his death, were to tell his executor to give out of the produce of the land, certain shares to so and so, and to do whatever the executor thinks best with it, and the executor acts up to the wâkif's instructions it will not be valid, for the *wakf* was complete from the outset, and the wâkif had no power to make any alteration unless he reserved the power to himself.

If a person make a *wakf* during his lifetime, but do not appoint a mutwalli thereof even when death comes upon him, but appcint an executor, such executor will be the executor as well as the mutwalli of the *wakf*. This is according to Abû Yusuf and the *fatwa* is according to him.

If, however, the wâkif appointed a mutwalli for the

[1] The *fatwa* on this point is according to Mohammed.

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wakf during his lifetime, his executor will not be the mutwalli of the *wakf*. There is great difference of opinion among the jurists whether the *Ahl-i-masjid*[1] can, upon the decease of the mutwalli of the mosque, appoint another mutwalli in his place without the order of the Kazi. The more correct opinion, however, is that such appointment will not be valid, although the person so appointed if he has discharged any duties connected with the trust and incurred lawful expenditure, will not be liable for the same.[2]

But when there in a *wakf* in favour of specific individuals limited in number, an appointment made by them unanimously of a proper person would be valid without the order of the Kazi, but it is preferable to lay the matter before the Kazi to appoint a man whom he considers fittest for the post. The (modern) jurists hold that in these times it is not necessary to apply to the Kazi for sanctioning the appointment of mutwalli, as the Kazis of our times have proved themselves not trustworthy. Nevertheless, the congregation of the mosque have no power to appoint a mutwalli, without informing the Kazi and obtaining his sanction to the appointment, in other words without ascertaining the opinion of the Kazi.

A supervisor is not entitled to spend any portion of the money of the *wakf*, for that work is entrusted to the mutwalli; and the supervisor's duty is to superintend and protect the interests of the *wakf*.

If a person in his (death)-illness were to direct his executor to spend out of the rents of his house ten dirhems every month in the purchase of food and to distribute the

[1] The congregation.

[2] It will be seen that according to the Radd-ul-Muhtâr this view has been abandoned by the modern lawyers, who hold such appointments valid.

same among the poor, the house would become *wakf*. In other words, it would be tantamount to his declaring that, "I have constituted my house a *wakf* after my death for the poor."

It is lawful for a mutwalli with the income of a *wakf* to erect shops, houses &c., which may yield profit to the *wakf*, as all this is for the benefit of the *wakf*. All properties purchased by the mutwalli out of the proceeds of the *wakf* become part of the *wakf* and are subject to the same legal incidents as the original *wakf* estate. And the mutwalli will not be entitled to dispose of them without the sanction of the Kazi.

If the directions of the wâkif, or the rules for the administration of the trust cannot be ascertained, the mutwalli should ascertain the practice of his predecessor and act accordingly. The mutwalli is not entitled to undertake any expenditure utterly inconsistent with the original character of the *wakf*, for example, a mutwalli of a mosque is not entitled to purchase cloth from the funds of the mosque and distribute the same among the poor; and if he does so, he will be liable to pay the money from his own pocket.

If a mutwalli contract a debt for the purchase of necessary articles for the mosque, when there is no money of the mosque in hand, in other words, if he has purchased goods for the *wakf* intending to pay for the same on realizing the rents thereof, or if he has paid for the same from his own pocket, he is entitled to pay the debt when the rents come into his hands or recoup himself as the case may be.

The mutwalli, however, is not entitled under any circumstance to create any incumbrance by way of mortgage upon the *wakf* property. Nor can the beneficiaries hypothecate *wakf* property. Accordingly, if the mutwalli

mortgages the *wakf* property and the mortgagee takes possession of the same, he will be liable for the customary rent thereof.

In the same way, if a mutwalli sells certain *wakf* lands, and subsequently the sale is set aside by the Kazi, the purchaser, if he takes possession of the said lands, will be liable for mesne profits, calculated upon the customary rates.

If a person finds a trove belonging to the *wakf*, the mutwalli may give something out of the same to the finder if he is poor.

A mutwalli may, when suffering from death-illness entrust the *towliut* to another person, that is, appoint a mutwalli in his stead, for the mutwalli is like an executor, and the executor is empowered to appoint an executor to the original testator.

If some portion of the building of the *wakf* is so dilapidated as to endanger the safety of others, and the neighbours insist upon the mutwalli repairing the same, and it happen that the mutwalli has no funds wherewith to repair the building, he can with the permission of the Kazi, contract a debt for that purpose. Debts can be incurred by the mutwalli only when there are no *wakf* funds in his hands to meet the requirements of the *wakf*. The mutwalli is authorized to deduct from the *wakf* income any sums spent by him legitimately for the purposes of the *wakf* out of his own pocket.

If a person make a *wakf* of his lands for the poor, without specifically providing for the cost of repairs or cultivation, the income will nevertheless be first employed in paying the *khiraj* or tax, and then for the payment of the cost of collection, maintenance, repair, cultivation and such like matters, and the residue (after defraying the said costs) will be applied for the poor, *e. g.*, if the

wakf consists of lands covered with date trees, the mutwalli should first pay out the expense of planting new date-trees and keeping up the old ones, for making walls and dams, so that the fruit-trees may not be exhausted or killed. If any portion of the land dedicated is unculturable, the mutwalli should take from the income the expense of rendering it fertile. If barns for storing grain, or reservoir for storing water be necessary for the irrigation of the lands, the mutwalli is entitled to spend a portion of the income for that purpose. If the *wakf* land is contiguous to the city, and it is more profitable for the *wakf* that it should be let to tenants than be used for cultivation, the mutwalli may erect buildings for tenants or let the land to them without buildings.

Mohammed says, that if the *wakf* lands become unculturable, and cease to yield any income, and the mutwalli can, with its price, get another piece of land yielding more profit, it is proper that he should do so; that is, he should [with the requisite permission,] sell the land and with its price buy another piece. But if the land is far away from towns so that buildings will not yield any profit, he may not erect buildings. Abû Jâfar has held that when the wâkif has made no provision regarding the mode in which the land should be used, the mutwalli is authorized to use the land to the best advantage for the *cestui qui trust*, but he cannot give a long lease, without the sanction of the Kazi.

If a wâkif has made a condition that the mutwalli shall not grant a long lease of the *wakf*, and people are not willing to take a short lease thereof, and it is to the advantage of the *wakf* that a long lease should be given, the mutwalli should prefer the matter before the Kazi, who, if he deems necessary, can make an order to that effect, "for the Kazi is the guardian of the poor." If

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the wâkif has made a condition that the mutwalli shall not grant a long lease unless he deems that it would be productive of great benefit to the *cestui qui trust*, the mutwalli can give the lease in case of necessity, without reference to the Kazi.

Discretionary Trusts.

If a man make a *wakf* of some property and declare that the mutwalli may give the income thereof to whomsoever he likes, or may apply the proceeds thereof according to his discretion, it is lawful,—and the mutwalli may give it to both rich and poor.[1]

[1] Though in the case of these discretionary trusts, the administration of the *wakf* is left to the discretion of the trustee, still, "the power is accompanied with a duty and meant to be exercised," and the Kazi will compel the mutwalli to apply the income to charitable purposes; comp. Lewin on Trusts, p. 530.

CHAPTER IX.

SECTION I.

THE POWERS OF THE WÂKIF.

According to Abû Yusuf, it is lawful for the appropriator to reserve the profits and income as well as the management thereof for himself; and the *fatwa* is according to him.[1] LECTURE VIII. (continued.)

It is also lawful for the wâkif to make a condition to the effect that the *wakf* premises may be exchanged for other property or sold, and the proceeds thereof invested for the purposes of the *wakf* in other lands or investments, with which the objects of the trust may be carried out. With reference to the reservation of the profits by the wâkif for his personal benefit, the commentator observes that the wâkif has the power of reserving the profits wholly or partially.[2]

The result is that according to Abû Yusuf, a dedication in favour of one's self is valid, whilst according to Mohammed it is invalid.

According to Abû Yusuf a person may dedicate in favour of his slaves.

There is a statement in Kazi Khan that when a person makes a *wakf* on himself and another, the *wakf* so far as regards that person will be valid and not with reference to himself; and if he says that *that* person should take after him, the whole *wakf* would be void.

[1] Fulton's Reports, p. 345.

[2] According to Mohammed the appropriator cannot reserve any portion of the profits for himself.

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"This statement is founded upon 'weak' authority; in fact it is not recognized as law, and so it is stated in the *Bahr*." That such a *wakf* is lawful is founded upon the most distinct authority.[1]

"The *fatwa* is according to the doctrine of Abû Yusuf, which has been adopted by Sadr-ush-Shaheed and the jurists of Balkh. And in the *Bahr* it is stated from Hâwi, that the doctrine has been adopted for the *fatwa*, in order to serve as an inducement to people to make *wakf* and to be charitable."[2]

As regards the power to exchange the *wakf* property, for other property, the question resolves itself into three heads; (1) if the donor has reserved to himself or to the mutwallis generally the power of making the exchange, in such a case, the exchange may be made without any question; (2) if no power is reserved, but the property yields no profit, then the exchange may be made with leave of the Kazi; (3) if it is simply advantageous for the *wakf* to make the exchange, in such a case the exchange is not lawful.

The wâkif according to Abû Yusuf, can lawfully reserve for himself the power of exchange and Kazi Khan has said that this is correct, and in another place that it is correct *bil-ijmaa*, by consensus.

A mere reservation of power to sell would lead to the invalidity of the *wakf*, unless the power of investing the proceeds in other property subject to the same trusts is attached to it, either directly or indirectly.

[1] Radd-ul-Muhtar, III, p. 598.

[2] *Ibid.*

كذا قاله الصدر الشهيد وهو مختار اصحاب المتون و رجحه في الفتح واختاره مشايخ بلخ وفي البحر عن الحاوي أنه المختار للفتوي ترغيبا للناس في الوقف و تكثيرا للخير

If a person declare, that if necessary the *wakf* land may be sold and the proceeds invested in other property, all the incidents of *wakf* would attach to the new property which will be subject to the same conditions as the original property.[1]

The wâkif may lawfully reserve to himself the power of excluding any person from the benefit of the trust or adding to the number of the beneficiaries or making reduction in their allowances.

Though the wâkif make a condition that the king or Kazi should not interfere in the management of the *wakf*, still the Kazi will have his superintendence over it, for his supervision is above everything.[2]

A *wakf* house situated in one *mahulla* cannot be exchanged for a house in another *mahulla*, unless the locality is more advantageous. The Allâmah has laid a further restriction on the freedom of altering the investment, by imposing a condition that the thing for which the *wakf* property is exchanged, or the new investment, should be of the same nature as the former property. In the Radd, however, the commentator holds that there should be no such restriction, as it is essential to see which investment would be most profitable. For example, a man may have made a *wakf* of shops and it may be more profitable to invest in land the proceeds arising from the sale of such shops, as yielding a larger income for the purposes of the *wakf*. Hence, when the power is vested in the mutwalli or the wâkif to dispose of the *wakf* property and invest the proceeds in other property similarly subject to the condition of *wakf*, there should be no such restriction as to insist that the new property should be of the same character or nature as the former property.

[1] Radd-ul-Muhtâr, III, p. 599.

[2] After the *Bahr*.

The proceeds of *wakf* property may be invested in *dirhems* and *dînars*. It must be remembered, however, that when an investment takes the form of actual money there is a possibility of the fund being wasted and therefore it is undesirable to keep the proceeds of *wakf* in that shape. If, however, it is in a shape from which profit can accrue without loss to the *corpus*, as in the case of Government securities, the investment is lawful. The Kazi, and in certain cases the mutwalli, are entitled to override any condition made by the wâkif which is inconsistent with the nature of the *wakf* or opposed to the requirements of the very object for which the *wakf* is constituted. For example, if there is a condition to the effect that the Kazi should not remove the mutwalli appointed by the wâkif or his successors in office, the Kazi would nevertheless be entitled to remove any mutwalli who proved himself unfit or commited misfeasance or misbehaved himself in the trust. Or, if it is stated in the wakfnamah that the mutwalli shall not grant a lease of the *wakf* property for more than one year; and it appears that no person is willing to take a lease for a year, the Kazi has the power to authorize the mutwalli to let the land for more than a year. Or, if the wâkif has declared that no alms should be given to the indigent who derive their subsistence from a certain mosque, the mutwalli is empowered nevertheless to give alms to such people. Or, if he has provided that the person for whom the *wakf* is constituted shall get fixed rations daily, the mutwalli may, with the consent of the *hukdars* (beneficiaries), commute the same into money payment.[1]

The Kazi is also authorized to increase the pay of the imam if it is insufficient, and the officer is learned and religious, *i. e.*, deserving.

[1] The commentator states that the beneficiaries are entitled to ask for commutation, Radd-ul-Muhtâr, p. 601.

According to the *Zawâhir-uj-jawâhir*, which is a commentary or the *Ashbâh-un-Nazâir*, the Kazi has the power of associating a mutwalli with the one appointed by the wâkif even though the wâkif may have made a condition against it, should the Kazi consider it would be beneficial for the trust to do so.[1] LECTURE VIII.

When the mutwalli or the wâkif consider it necessary or advantageous for the *wakf* to sell the property and invest the proceeds in some other property, or to exchange it for another property, he can only do so with the permission of the Kazi learned in the law.[2]

[1] *Ibid*, p. 602.

[2] In the ordinances of Abû Saood, there is an order issued by the *Sadr-ush-sharâya* of the time, in the year 951 Hejira, declaring that no sale or exchange of *wakf* property should take place without an order of the Sultan (or his representative, the Judge) ; *Ibid*, p. 603.

CHAPTER X.

SECTION I.

WAKF TO NON-EXISTING OBJECTS.

LECTURE IX.

Wakf to an unborn child or a non-existing object.

A *wakf* is valid even though made in favour of an unborn child or a non-existing object. For example, when a *wakf* is made in favour of Zaid's children, (and Zaid has no children existing at the time,) or to a musjid which has not been erected, the appropriation is valid and the rents and profits will be applied to the support of the poor, until children are born to Zaid, or the mosque is erected. This is according to the *Imâdiah*. In the *Nahr-ul-fâik* it is stated further, that when the object for which the settlement is made has not come into actual existence, but the purpose can be carried into effect, the rents and profits will be applied to that purpose so far as it is possible to do so. For example, when a man makes a grant for the support of the students of a madrassa which has not been erected, if lectures are given to students in any other building, such students will be entitled to support from the *wakf*.

The application of the doctrine in Hanafi law.

The object of a *wakf* may be non-existent in two ways :—*Firstly*, the beneficiary may be non-existing when the *wakf* is made, when it is called *wakf munkata-ul-awwal*, and *secondly*, the persons, for whom the *wakf* is made, may cease to exist after the creation of the *wakf*, when it is called *wakf munkata-ul-wasut*. Examples of both classes of cases are given in Kazi Khan, *e. g.*, a man makes a *wakf* for the children born of his loins, if he has no children at the time, it is a *wakf munkata-ul-awwal*,

and the rents and profits will be applied to the benefit of the poor. If children are born to him afterwards, then the rents and profits will be paid to them.[1] Lecture IX.

Similarly as stated in the *Asaáf*, when a settlement is made in favour of one's *walad* (child), and there is no *walad* existing at the time, but there is a grandson, the income of the *wakf* will be given to the grandchild until a child is born to the wâkif.

An example of the second or *wakf munkata-ul-wasut* arises in this way;—a *wakf* is made in favour of two sons and *after them* in favour of their children and children's children, and subsequent thereto one of the sons dies leaving him surviving the other son, it is a *wakf-munkata-ul-wasut*. In this case, half of the rents and profits will go to the surviving son and the remainder to the poor and indigent, and when the surviving son dies the entire rent and profits will be given to his children,[2] for the wâkif has reserved the interest of the *wakf* for the grandchildren only after the demise of both the sons. But should it appear that the intention of the wâkif was that the surviving son should take the entire benefit, or the interest of the deceased son should descend to his issue, effect would be given to such intention.

The *Khairiyeh* states the law somewhat differently, *viz.*, where the object of the *wakf* is not existing or ceases to exist, the rents and profits will be applied to purposes nearest the object for which the donor intended the *wakf*. This view, however, is not according to "us" (that is, Hanafi doctors) but represents Shâfeï doctrines.[3] According to the Shâfeïs, where a *wakf* is made in favour of lineal descendants and they fail, the *wakf* will be applied to other people "nearest" to the wâkif.[4]

[1] Radd-ul-Muhtar, III, p. 641.

[2] *Ibid.*

[3] Compare the Shiah law on the subject.

[4] *Ibid*, p. 641. Compare the Shiah law on the subject.

LECTURE IX. In the *Hâwi* it is stated (by way of an example) that when one reservoir has become destroyed and there exists no need for it, the *wakfs* attached to it would be applied in support of other reservoirs.[1]

It is laid down in the *Khulâsa*, that when a mosque or reservoir has fallen to ruin and there is no further need for them, the inhabitants having left the neighbourhood, the *wakfs* attached to them will be applied to other mosques or reservoirs.[2] For the same reason, if the Imam or his delegate were to withdraw a piece of land from the *Bait-ul-mal* and grant it to an individual for the construction of a canal for the use of the public, and subsequently, owing to the depopulation of the country there exists no need for such a canal, the grantee does not acquire the land as his private property; he will hold it subject to the condition of storing vater for the use of flocks and cattle. According to the Shâfeïs he would take it absolutely.

The *Nahr* states thus the result of the above principles :—" according to us " [3] when the beneficiaries of a particular appropriation have ceased to exist, the proceeds arising therefrom will be applied to a *wakf* of the same nature. Consequently the *wakfs* of one mosque will be applied to the support of another mosque, and of a reservoir to another reservoir. To withdraw land from the *Bait-ul-mal* is analogous to the creation of a *wakf*. And, therefore, when land is thus withdrawn and given to

[1] *Ibid*, p. 642.

[2] When the sovereign or imam withdraws a piece of land from the Public Treasury (*Bait-ul-mal*), that is, makes it rent-free and designates the purpose to which the income derivable from it should be applied, it becomes *wakf*. Mere withdrawal of land from the (*Bait-ul-mal*,) or declaring it rent-free, does not render it necessarily *wakf*, though it resembles in its nature a *wakf*.

[3] Meaning the Hanafis.

a person for the construction of a canal for the use of the public, it will on the failure of the canal be applied to the watering of the flocks and cattle and similar objects. LECTURE IX.

When a man makes a *wakf* of his property,—a moiety—in favour of his poor kindred, and a moiety in favour of the indigent generally, would the relatives, in case of indigence, be entitled to share in any portion of the other moiety? Hillal has answered the question in the negative. And Ibrahim-ibn-Khâlid Sâmâni agrees with him.

But Ibrahim-ibn-Yusuf and Ali-ibn-Ahmed-al-Farsi and Abû Jâfer Hindwâni differ, and hold that when the relatives become poor they are entitled to participate with the general indigent. And it is stated in the *Nahr*, that the same is the view of the Kazi-ul-Kuzzât Maulâna Ali al-Halabi, who wrote his *Risala-i-Kubra* about the period when Maulâna Mohammed Shah Baderna's rule came to an end. And in the Kazi Khan it is laid down that, according to the approved doctrine, when a *wakf* is made in favour of an individual and the poor generally, if that person subsequently becomes poor he is entitled to participate in the *wakf* for the poor.[1]

Distribution of a *wakf* to a wife and son.

According to Kazi Khan, if a man were to make a *wakf* of his land, a moiety in favour of his wife and the other in favour of his son Zaid, with a condition that upon the wife's death, her moiety would be *wakf* for his (the grantor's) children,—Zaid would be entitled to participate in that moiety also as one of the children. The wife's moiety would therefore go to Zaid and the rest of the wâkif's children and Zaid's moiety would be for him alone. "There is no difference of opinion on this point."

When a *wakf* building falls into ruin, the mutwalli is not entitled to sell the trees planted within it for the

[1] *Ibid*, p. 642.

LECTURE IX. purpose of repairing the house, but he can hire out the house and with the rent thereof repair the building. The conditions laid down by the wâkif, if lawful, are to be strictly carried out in the same way as if they were the commands of the lawgiver.[1]

In carrying out the provisions of the trust the intention of the donor must be solicitously regarded, and in case his meaning is not distinct recourse should be had to evidence to explain the meaning, and the inferential shall be considered equally with the actually expressed.

But when the language is upon the face of it unequivocal and unambiguous, no outside evidence will be let in for the purpose of altering or modifying the intention of the wâkif. For example, if the wâkif has declared that he endows certain property for his children who are males, no evidence will be admitted to show that he also intended to include females. But, where from the language of the wâkif itself it can be inferred that he meant to include the females, they would participate with the male children. In understanding, however, the meaning of the donor from the actually expressed words, consideration should be paid to the circumstances of the particular case and the customary use of language among the people.[2]

If the words are capable of two meanings the construction most consistent with the intention of the wâkif must be adopted.

[1] Radd-ul-Muhtar, III, p. 643. [2] *Ibid*, p. 644.

CHAPTER XI.

Section I.

PRINCIPLES OF CONSTRUCTION.

When a man makes a *wakf* and constitutes himself mutwalli thereof during his lifetime, and declares that after his death his son A. shall be the mutwalli, and after him the fittest and worthiest of his children, the latter "his" refers to A. and not to the wâkif. Lecture IX.

If the *wakf* is for Zaid and Amr and his children, the pronoun "his" refers to Amr.

If a man constitute a *wakf* for his children and *such of his children's children as are male,* the qualification refers to the grandchildren and not to the children.

Q.—A person makes a *wakf* for his son named Hassan and for his children (اولاد), that may be born subsequently, and after them for their children that may be male, and after them for his children that may be female and for their children. After the constitution of the *wakf,* another son is born to the wâkif whose name is Mohammed, and subsquently Hassan dies. Does the first *his* refer to Hassan or the wâkif, so as to include Mohammed in the *wakf?*

A.—The Hanafi Mufti of Egypt, whose name is Moulâna Shaikh Hassan Sharniblalieh answers the question thus, "the pronoun *his* refers to the wâkif, and the *Khairiyeh* adds this is most consistent with the intention of the wâkif; and it has been decided that when a word is equivocal in its meaning and is capable of a double construction, the construction most consistent with the

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"The expression *Insha-allah* is a proviso, an *istisna*,"[2] but it is not equivalent to *illa* (but). According to the Shâfeïs, a proviso refers to the whole document and not to the immediate provision only. According to the Hanafis, it refers only to the last condition, provided it can be separated from the other conditions, *otherwise to all.* For example, if a man were to say I make my house *wakf* for my children and my garden for my brothers, but should they go away it shall cease, the proviso refers to the condition regarding the brethren.

But if he had said, "I make this house *wakf* for my children and children's children, but if they go away it will cease to be *wakf*," the proviso would be general. Among the Hanafis, if a person make the necessity of a qualification a necessary condition to receive the benefits of a *wakf*, the qualification refers to the persons in immediate connection with whom the condition is mentioned. But if it is clear that the qualification refers to all it will have effect given to it generally. For example, if a person make a *wakf* for his indigent children and his children's children, the qualification of indigence is restricted to the children alone. But if he said the *wakf* is for his children's children who are indigent, it refers to both.

According to the Shâfeïs, the qualification would refer to all in any case.

If a person should constitute some portion of his property a *sadkah-i-moukoofa* for Abdullah and Zaid, the

[1] *Ibid.* p. 669.

[2] When the settlor makes use of the expression "Inshâ-Allah," in connection with any provision, it must be regarded as precatory.

income will go to these as tenants in common, and when one of them dies his share would go to the poor, and upon the demise of both of them the entire rent and profits would be given in charity. Similarly, when a *wakf* is in favour of a class (*kowm*), the rents and profits will be divided among them, according to their number as tenants in common. And on the death of any one of them his share will be given in charity to the poor. When the appropriation is made in favour of "the child of Abdullah," without mentioning a number, the children of Abdullah will take as joint-tenants and so long as there is any one of his issue living, nothing is to be given in charity to the poor. When two persons are named, *e. g.*, Zaid and Amr, and it is provided that Zaid should get a half and Amr two-thirds, the whole is to be divided into seven parts, as in the case of the increase (*awl*) in inheritance, of which three are to be given to Zaid and four to Amr. When a settlement is made in the following terms:—"to Zaid a half and to Amr a third" each is to have the portion mentioned for him and the remainder is to be divided equally between them. When the wâkif makes the settlement in these words—"My land is a *sadkah* appropriated for Zaid and Amr and to Zaid out of it a third or a hundred dirhems," and is silent as to the other, Zaid shall get what is mentioned for him, "and the remainder is for him of whom nothing has been said." And so in all other cases where one is named and silence is preserved with regard to the other. When the wâkif has provided that each of the beneficiaries should get a specific sum, and owing to loss of income, none of them can get the exact amount, the actual income will be divided in proportion to their respective allowances. But, when the income more than covers the allowances, the excess shall be shared by them equally.

When the appropriation is for a class of persons (*kowm*) and they all reject it, the produce is for the poor. But where only some reject it, the whole of the produce shall go to those who do not reject, if the designation under which the settlement is made is generic and the term applies to them all; but if the name is inapplicable to them, the share of those who reject passes to the poor. Thus when the wâkif has said "to the children of Abdullah" and some of them reject, the whole is for those that accept. But if he were to say "to Zaid and Amr." and Zaid rejects, his share passes to the poor.

An appropriation by a person during his last illness is valid to the extent of one-third of his estate, unless it is assented to by his heirs. When the appropriation exceeds the one-third and is not assented to by the heirs, it is void as to the excess. When a person makes his land, "a *sadkah*, appropriated to Almighty God, for his child and child's child and his *nasl* for ever, so long as there are any, and after them for the necessitous," and this land falls within a third of his property, its produce will be divisible among all his heirs according to their shares in his heritage; and, accordingly, if he leave a wife and children, an eighth will be given to his wife, or if he leave both parents and children, a sixth is to be given to his parents,—the remainder, in either case, being divisible among the children, in the proportion of two shares to a male and one share to a female. This is the case when the wâkif has left children of his own and no grandchildren. But when he leaves him surviving both children and grandchildren, the other circumstances of the case being the same, the produce is to be divided according to the number of the children and grandchildren, *i. e.*, *per capita*, and the portions of the children in this division are to be divided among them according to

the rules of inheritance, and the portions of the grandchildren are to be divided among them equally. And when the children of the loins are exhausted, the produce will be divided among the grandchildren and their *nasl*, the widow and parents taking nothing. If the land in question "does not come out" of the third of the wâkif's estate, but the *wakf* thereof is assented to by the heirs, it is lawful in respect of the whole property dedicated, and its income will be divided among the children in equal shares (without any preference of the male over the female), to the exclusion of the wife and the parents who will take nothing. But if the heirs do not assent to the dedication, it will take effect as a *wakf* for the poor with respect to the portion forming one-third of the wâkif's estate, and the income will be divisible among all the heirs according to the rules of inheritance; and on the extinction of the appropriator's descendants the produce of that portion will be given to the poor.

When a *wakf* is created during the last illness and legacies are also made, they will have operation given to them out of one-third of the estate.

If one should say "The produce of this my land is to be given after my death to the child of Abdullah and his *nasl*," it is a bequest of the produce. And in like manner, when one has said "Detain (حبس) it after my death on the child of Abdullah," or "My land after my death is settled on such a one and his *nasl*, and is not to be sold," all these expressions constitute a bequest of the produce. But if he were to say, "My land after my death is *settled on the poor* or is a *hubs* on the poor" this would be a lawful *wakf*.

If a man were to declare, "This my land is a *sudkah* settled on my child (*walad*)." the produce is for the child of his loins, males and females taking equally; and so long as

Principles of construction according to the Alamgiri.

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[Unless the intention can be inferred that the grandchildren should take also.]

there is in existence one child of his loins, the produce is to him or her only. When there no longer remains one of the generation (*batn*), the produce is to be expended on the poor, nothing being allowed to the child of a child. But if he had no child of his loins at the time of the settlement, and there was then a child of a son, the produce is to the son's child, none of the generations below him participating with him, for the child of a son in the event of there being no child of the loins comes into his place. The child of a daughter is not included, according to the *Zâhir-ur-Rawâyet*, which is correct. If after this he should have a child of his loins, the future produce is to be expended on such child. When there is no child of the first or second generation, but there happens to be a third, a fourth and a lower generation, the third generation and those below them participate together, even though there should be many of them. Everything that has been said of the words "my child" is applicable to words "child of such an one."

If one should say, "This my land is a *sadkah* settled on my child, and child of my child," the child of his loins, and the child of his child in existence on the day of the settlement, and those who are born afterwards are included, and the two generations participate in the produce; but none below them are included, nor the children of daughters, according to the *Zâhir-ur-Rawâyet*: and the *fatwa* is in accordance with it. And if he should say, "upon my child, and child of my child, and child of the child of my child," mentioning three generations, the produce is to be expended upon his children for ever, so long as there are any descendants, and is not to be applied to the poor: while one remains the *wakf* is to that one, and the lowest among them, the nearer and more remote being alike, unless the appropriator say in

making the *wakf*, "the nearer is nearer," or say, "on my child, then after them on the child of my child," or say, "generation after generation" (*batnan baád batn*), when a beginning must be made with them with whom the appropriator has begun.

If he should say, "This my land is a *sadkah* settled on my children (*awlâd*,)" all generations are included on account of the general character of the name; but the whole is to the first generation while any remain; and when they are exhausted, to the second; and when they are exhausted, to the third and fourth and fifth, all these generations participating in the division, and the nearer, and more remote being alike. If he should say, "I have settled it on my children," and he has only one child at the time of the produce, half of it will be for that child and half to the poor. But if the words were "on my child," and he has only one, the whole of the appropriation is for that child. So, also, when he has had several children and they have failed, leaving only one remaining. A man appropriates an estate by the words, "*sadkah* on his two children, and when they fail then upon the children of both, and the children of the children of both for ever so long as there are descendants," and one of the children dies leaving a child, half of the produce is to be expended on the surviving child, and half to the poor; but when the second of the children of the appropriator dies, the whole of the produce is to be expended on the children of the two, and the children of the children of the two. If he should say, "This estate is *sadkah* settled on the needy of my children," and there is only one needy child among them, the half of the produce is to be expended on him and half on the poor.

If a person should say, "This my land is a *sadkah* settled on my sons," and he has two or more sons, the pro-

LECTURE IX. duce is to them. If he have but one at the time of the existence of the produce, half of it is to him and the other half to the poor; and if he have sons and daughters, the produce is to them equally, according to Hillal, and this is correct, and is as if he had said, "My land is settled on my brothers," having brothers and sisters, when all would participate. And if he should say, "upon my sons," and he has no sons, but only daughters, the produce would be for the poor; and in like manner, if he should say, "upon my daughters," and he has only sons, the produce would be given to the poor.

If one should settle his estate on his son, and his children, and their children for ever, so long as there are descendants, the produce is to be divided among them, according to the number of heads, males and females being on an equal footing, and the children of daughters being included.

If one should make a settlement on his *nasl*, or *zureeut* (both words meaning progeny), the children of his sons and the children of his daughters would be included, whether near or remote. But if the settlement were on one *who is related to him* (*mun yunsibo*), the children of daughters would not be included.

A man declares, "My land is *sadkah* settled on my child and my *nasl*," the settlement is valid, and the males and females of his children and children's children are included; the near and the remote, the children of sons and the children of daughters, the free and slave, being all equal, though the shares of the slaves belong to their master. And if he should say, "I have settled it on my child and my *nasl*," and he has a grandchild at the time, but a child of his loins is born to him after the settlement, they both participate in the benefit. So also, if he should say, "This my land is *sadkah*, settled on my

children in being, and on my *nasl*," a child subsequently born would enter by means of the word *nasl*. If the words were "on my children in being and their *nasl*," the children in being and their *nasl* would enter, whether the *nasl* were in being or not, but none of his children who are not in being, nor their *nasl*, would be included. So also if he had said, "upon my children in being, and their children, and their children," and there should afterwards be born to him a child of his loins, that child would not be included. And if he should say, "upon my children in being, and on the children of their children, and their children, and their *nasl*," his children in being and their children in being and their children, and the children of their children for ever while there are any *nasl* or descendants, are included; but if he should say, "upon my children in being, and the children of their children," and nothing further, the child of a child would have nothing.

When one in good health says, "I have made this my land a *sadkah* appropriated to Almighty God for ever, for my child, and the child of my child, and the children of their children, and their *nasl* for ever, so long as there is any *nasl*," every child that he had at the time of the appropriation, and every child born to him thereafter before the existence of the produce, and child of the child for ever, enter into the benefit of the produce of this *sadkah;* and if any of them should die before the existence of the produce, the share of the person deceased would fall to the ground; but if the death should not occur till after the existence of the produce, the person dying would have acquired a right to his share, which would pass to his heirs, the higher and lower generations sharing equally, unless it had been said in making the appropriation that a beginning was to be made with the higher generation, and then the generation below it. In that case, if

all of the higher generation but one person should die, the whole would go to that person alone, to the exclusion of the generation below. And if one should say, "for my child and child for ever, so long as there is any *nasl*," without saying *batnan baâd batn*, but adding, "as often as one dies his share of the produce is to his child," the produce would, before the death of any of them, be among the whole of the children and children's children and their *nasl* equally; and if one of them should die leaving a child, the share of the deceased would go to his child, who would thus take his father's share in addition to that appointed for himself by the appropriator.

A man settles his land on his children (*awlâd*) with an ulterior destination for the poor, and some of the children die: their shares, according to Hillal, are to be expended on the survivors, and when they all die the produce is to be expended on the poor, and not on any child of a child. But if he had settled it on his children, naming them, saying, "upon such an one, and such an one, and such an one," with an ulterior destination for the poor, and one of them should happen to die, his share would go to the poor.

And if a man should say, "This my land is a *sadkah* settled after my death on my child, and child of my child, and their *nasl*," and should then die, the appropriation as to the child of his loins is not lawful, but as to his child's child it is lawful. So long, however, as there is a child of the loins living, the produce is to be divided every year according to the number of heads, and what comes to the child of a child is *wakf*, and what comes to a child of the loins is heritage to be divided among all the heirs, so that a husband and wife and others participate. If in these circumstances some of the children of the loins should die, the produce is to be divided according to the

number of heads of the children's children and surviving children of the loins, and what pertains to the surviving children of the loins is to be divided among all the heirs living and dead of those who were alive at the death of the appropriator. Hillal has said, in his Book on *Wakf*, with regard to a man who made a *wakf* on some of his children, and mentioned that the *wakf* was during his life and after his death,—that the words, "after his death" does not, according to the most authentic report, constitute a legacy to an heir, but rather bears the construction of a perpetuity.[1]

Principles of construction from Kazi Khan and, Radd.

When a *wakf* is made in favour of Zaid and his children and after them in favour of the poor, and Zaid were to declare that the *wakf* was in favour of Amr and the poor, his declaration would not affect the interests of the children or the poor. But the rents and profits will be divided equally among Zaid and the children in existence at the time, and half of Zaid's share would be given to Amr.

If Amr died before Zaid his share would be given during the lifetime of Zaid to the poor. Should Zaid die before Amr his interest in the profits would cease.

If the *wakf* is for Zaid and the poor, and Zaid makes a declaration in favour of Amr instead of himself, in that case the rents and profits will be divided equally between Zaid and Amr, and when Zaid dies, the entire rents and profits will go to the poor. If Amr dies during the lifetime of Zaid, half of Zaid's share will be given to the poor. For when Zaid has declared himself entitled only to a moiety and Amr to the remaining moiety, in that case Amr's half only goes to the poor.

[1] In giving the foregoing principles from the Alamgiri (II, pp. 474-475) I have generally adopted the language of Baillie, pp. 574, 575. These principles must be taken subject to what follows in the next section.

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If a person is appointed mutwalli and he acknowledges another to be the mutwalli instead of himself, the latter will be entitled only to a share in the income of the acknowledgor during his lifetime. Upon the death of the acknowledgor the effect of the acknowledgment ceases, and the *towliut* goes with all its adjuncts to the person designated by the wâkif.

No beneficiary is entitled to substitute another in his place, but he may appoint another person to receive his allowance.

When there are two contradictory provisions in a wakfnamah, the one which follows will be given effect to, according to "us," as the last condition over-rides the first.

With reference to the principle that when there are two contradictory conditions in a wakfnamah, the second has effect given to it in preference to the first, the *Asaâf*[1] gives examples of it. For example, if in the beginning of the wakfnamah the wâkif declares that the subject-matter of the *wakf* shall not be "sold nor given in gift or become the property of anybody," and subsequent to that declares that it will be lawful for the mutwalli to sell the property, and with the proceeds thereof to purchase property which will be substituted for the original *wakf*, in such a case the sale of the *wakf* will be valid, and the second condition will override the first. Or, if he were to say first, that the mutwalli may sell the *wakf* property and purchase something else in its stead and afterwards declare that it shall not be sold or given

[1] The *Asaâf* is the work of Allamah Burhanuddin Ibrahim, Trabulasi, (*i. e.*, of Tripoli.) Of this work Moulâna Mohammed Amin, the author of the Radd-ul-Muhtâr, speaks thus :—"Should the exigencies of this world make it necessary for any individual to study the law of *wakf*, he should study the *Asaâf*, as it is the greatest authority on the subject."

in gift, then it will not be sold. But, when the two conditions are not contradictory, and it is possible to give effect to both of them, then it will be incumbent to carry out both, for the conditions of the wâkif are like the *nass*. When there are general provisions and after them come the details, these (unless otherwise apparent on the document) will apply to the last condition, according to "us."

According to the Shâfeïs, these details refer to all the conditions, if the connection is with an "and" (*waw*); but only to the last condition, if the connection is with "then."

When a *wakf* is made in health and the wâkif declares that the distribution of the income should be according to the *Farâiz-ullah* among his children, the division would take place among all the beneficiaries, without distinction of sex, in equal proportions.

When a *wakf* is made in favour of consanguine and uterine brothers, they take equally.

When a *wakf* is made in favour of children, the income is to be divided among them equally. This is according to Abû Yusuf and the *fatwa* is according to him. A condition in the wakfnamah giving to one child a greater interest than the other, or to the sons more than the daughters is sinful, as it is sinful to make any difference in gifts. This is the opinion of all leading jurists. Shaik Nuruddin Mukaddasi, Mufti of Cairo, and Shaikh-ul-Islam Mohammed Tahtawi, Shâfeï Mufti of Egypt, have given decisions to the same effect, that is, when the wâkif makes a *wakf* in favour of a class, all persons belonging to that class take equally, whether they belong to the same sex or not, or whether they differ in their roots, for example, when it is in favour of brothers, consanguine and uterine brothers take together and not accord-

LECTURE IX. ing to their shares under the law of succession. Similarly, if a man were to say that in case of his dying without issue, the *wakf* would enure to the benefit of his relatives belonging to the class nearest to him in degree, and he dies leaving only one paternal uncle's son and two paternal uncle's daughters, the male and female cousins take the income in equal shares. The meaning therefore of *Faráiz-ullah* is not that the division should be according to their shares under the law of inheritance, but according to the rule laid down by the Prophet in which he declared that no preference should be shown in gifts; and consequently the donees will take equally.

In connection with this subject, it may be observed that in the case of some deeds of trusts executed by Mahommedans in the English language, an endeavour is made to exclude the operation of the Mahommedan Law by the use of such expressions as the following, "any provision of the Mahommedan Law notwithstanding." This phrase is apparently borrowed from the language used in the Mysore Trust Deed, by which the Government of India gave to certain trustees Government securities for large amounts to hold in trust for various members of the Mysore family, and declared that "from and after the death of such person (*viz.*, the person in whose favour the trust was primarily created,) provided he or she shall have lawful issue, the note standing against his or her name as aforesaid ...... shall remain and be in trust for the widow or widows and for the lawful lineal descendants living at the decease of the person so deceased, who shall attain to the age of eighteen years, the widow singly or widows collectively to take an eighth share, and male descendants to take double the shares of females, and children to represent and take *per stirpes* the shares or presumptive shares of their parents, any rule of Mahommedan Law notwithstanding &c."

In this case, the Government, as the grantor, was probably entitled to make any condition as to the mode in which the distribution should take place on the death of the original *cestui qui trust*. When a trust of the same character is created by a Mahommedan, it must be treated as a *wakf*. But it only creates a life-interest in favour of the person first named, with the remainder absolutely to his or her descendants living at the time of his or her death. Such an estate will take effect under the Hanafi law as giving an estate of inheritance to the first donee. The mere fact that the legal estate is vested in trustees does not make any difference in the character of the grant. Under the Shiah law, the original grantor would take an interest for life, and his descendants living at his decease, an estate of inheritance. Can the grantor, in either of these cases, vary the rule of Mahommedan Law as to inheritance? The words used by the Judicial Committee of the Privy Council in *Tagore* v. *Tagore*[2] are in point:—

"The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law. Inheritance does not depend upon the will of the individual owner: transfer does. Inheritance is a rule laid down (or, in the case of custom) recognized by the State, not merely for the benefit of individuals, but for reasons of public policy; Domat, 2413. It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law

[2] 9 B. L. R. p. 376, see p. 394; see also I. L. R. 8 Cal. p. 1. In *Nawab Amjad Ali* v. *Mahamdi Begum*, the *gift* was to a person in existence. Settlements in favour of non-existing objects can only be made by way of *wakf*.

LECTURE IX. directs. This was well expressed by Lord Justice Turner in *Soorjeemoney Dossee* v. *Denobundoo Mullick*[1] :—' A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy.' "

When a man makes a *wakf for the sons of A., excepting the sons residing abroad*, and then some of the sons leave the city or country, they lose the right and do not recover it on their return to the country. Similarly if a *wakf* is made for the children of A., engaged in the persuit of learning, and some of them give up study they lose all interest and do not recover it on resuming their studies, unless in all these cases the wâkif has declared that they would get back their interest on their return.

A person claiming an interest in a *wakf* created for the poor relatives of the wâkif, on the ground that he (the claimant) is a poor relation, is bound to prove his right, *first*, that he is a *karabatdar*, and *secondly*, that he is poor. He cannot subject the mutwalli to affirmation.[2]

The principle, upon which persons who leave a certain locality are precluded from participating in the benefit of a *wakf*, does not apply to a case like the following :— " A man makes a *wakf* for his poor relations residing at Bagdad, and some of them go and live at Kufa and after a while they come back to Bagdad, [on their return] they regain their right to share in the benefits of the *wakf*." The reason of this is that their condition should be regarded at the moment when the distribution takes place, as their poverty forms the basis of their claim and the object of the wâkif is to help his poor relatives.

When a man makes a *wakf* for his descendants, and after the mutwalli has been dividing the produce among

[1] 6 Moore's I. A., p. 555.

[2] A wife is not included in the term *akriba* ; *Advocate-General* v. *Fatima Begum*, 9 Bom. Reports, p. 17.

certain of his descendants, another person establishes his right also to a share as one of the descendants of the wákif, he will be entitled to recover the past share if the mutwalli has divided the shares without the sanction of the Kazi. The mutwalli's position in such case is like that of an executor who, after paying some of the creditors, divides the remainder of the testator's estate among the poor, and subsequently thereto arises another creditor who establishes his claim, he is entitled to proceed against the executor for the satisfaction of his debt. LECTURE IX.

When a man makes a *wakf* in favour of his *sons* or his *children*, and there is only one child, he or she will take one half and the remainder will go to the poor, but if he were to say it was for his *son* or *child*, the entire produce will go to the one child.

In connection with this subject, however, it must be remembered that "the object of the *wakf* depends on custom (*urf*), and if a person were to make a *wakf* for his children, and his children's children with the intention that whosoever among them may be surviving should take the whole of the produce, the entire produce will go to his descendants, though there may be only one."

When a settlement is made by a person in favour of the people of his *bait* or house, every one is entitled who is connected with him by ancestry "to the most remote of them in Islam," without distinction of creed or sex, or the nature of the relationship. "The Moslem and non-Moslem, the male and female, the prohibited and the unprohibited, the near and the remote are all alike in this respect. The remotest ancestor, however, is not included. But the child and parent of the appropriator are included, though not the children of his daughters and sisters nor the children of any other females besides these, except when married to paternal nephews of the

appropriator." As-Sarakhsi has stated in his commentary on the *Siyar Kabîr* that the words "people of the house" when they occur in deeds of *wakf* or wills are to be construed according to the intention of the testator. If by "house" he intended his residence, "the people of his house" should be taken as meaning those who reside in family with him and are maintained by him, though there may not be any of his *karâbut* or kindred among them; and if by "house" he meant *nasab*, then the people of his house are all the recognized children of his father. Imam Ali as-Sugdi, however, maintains that if the person have a house of *nasab* like the Arabs, the words "people of his house" would mean the descendants of his ancestors, (lit., the children of his fathers) though they should not be residing in family with him; "but if he have no house of *nasab*, they are those living in family with him and maintained by him and none others, though they should be of his kindred and this is approved." When a settlement is made on the people of the house, "those in existence are included, and those who may come after them, of their children and children's children."

When a person uses the expression *âl* or *jins*, it is in effect the same as "on the people of my house", and there is no speciality in favour of the poor, unless the *wakf* is made specially for them. The phrase "on the poor of them" is like "on those who become poor," and consequently, "the produce is for him who is poor at the time, though he were rich when the settlement was made and it is not restricted to those who were rich and have become poor." If a woman should make a settlement "on the *ahl* (people) of her house" or "on her *jins*," her mother and her child would not be included."[1]

[1] The *dictum* in the Alamgiri that "when a woman makes a settlement on the *ahl* (people) of her house or "on her *jins*," her mother and her child would not be included, is explained further on.

If a man should say "on the *ahl* of Abdullah," it would be for his wife specially, according to Abû Hanifa. Hillal, however, has said, "We think it better to make it include all free persons of his family living together with him in his house"; and this is approved. But slaves are not included, nor Abdullah himself nor persons of his family living in another house. Lecture IX.

Ayâl comprehends every one maintained by a person whether living in his house or not, and *hasham* is synonymous with *ayâl*. By *akb* are to be understood all those who are connected with a person through his father, and the children of daughters are not included except females whose husbands are among these. And if one should make a settlement on Zaid and his *akb*, Zaid himself being alive and having children, these would have nothing, for the child of a man cannot be called his *akb* except after his death.

The following rules are laid down in the Alamgiri relating to the distribution of the income of a *wakf* for the poor kindred :—1. It is to be expended in the first place on the poor of his kindred and the surplus only given to strangers. 2. Poverty on the day of the produce coming into existence is not to be regarded but rather poverty on the day of distribution. 3. The nearest in kindred are first to be supplied, and then the more remote, that is, the child of the loins has priority, and after him the child of a child, then the third generation, and then the fourth and a lower generation. If none of these remain, or there is a surplus after satisfying them, it is to be betowed on the more remote of the poor kindred beginning here also with the nearest among them. 4. That to each person to whom a portion is given something less than two hundred dirhems be given, that is, when the *wakf* is for the poor generally and some of the kindred

LECTURE IX. are in need. But if the *wakf* be for the poor of a person's kindred, the whole produce is to be distributed among them, though the share of each should exceed two hundred dirhems.[1]

When an appropriator has appointed the produce for debtors or travellers, or in the way of God, as for pilgrimage, and some of his children or kindred fall into want, no part of it is to be given to them, unless the child or the relative be a debtor or a traveller &c., when also a beginning is to be made with them.

Evidence of reputation may establish a *wakf*.

A *wakf* may, according to the jurists of Balkh, be validly established by evidence of reputation.[2] If the dedication is one within the knowledge of the general public, as a matter of notoriety,[3] it can be established by the testimony of witnesses, or it may be established by the evidence of user for the purposes of the dedication.

It is not necessary that the endowment should be in writing, or that the property should be delivered over. A verbal declaration of the intention to create an endowment is sufficient if made in the presence of witnesses.[4] Although the witnesses to the fact depose vaguely, yet their evidence, if corroborated by circumstances, is legally sufficient.[5]

The *wakf* of a property which is wrongly described in the wakfnamah is valid, if it is clear what was intended to be conveyed in trust. If the description, however, is so uncertain and indefinite as to render it impossible to find out what was intended to be conveyed, the *wakf* will not take effect.

[1] Alamgiri II, p. 475, Baillie, p. 594, (2nd Ed.).

[2] Kazi Khan.

[3] "Like the *wakf* of Amr ibn ul-Âs," (the Amru of European history.)

[4] Doe d. Jan Bibee *v.* Abdoollah Barber, 1 Fult., 345; Shurbo Narain Singh *v.* Ally Buksh Shah, 2 Hay, 415.

[5] Abul Hasan *v.* Haji Mahammad Masih Karbalai, 5 Sel. Rep., 87.

When a person makes a dedication by a deed and afterwards says he does not know what is contained therein, and that he did not intend to create an irrevocable *wakf*, or that he wanted a condition inserted in it reserving to himself the power of selling the property when required; in such case, if it appears from the evidence of witnesses or otherwise, that the document was either read by, or explained to the person, and that he fully understood its purport, his denial will be of no avail. And this principle does not apply to *wakf* alone but to all transactions.[1]

A person intending to make a *wakf* of all his lands in a particular village gives instruction at the time of his death for the preparation of a document therefor. The writer, however, by mistake leaves out certain plots of lands. If at the time of reading the document, the plots left out by mistake are not called to his attention, but he says that he dedicates all that is contained in that village, the *wakf*, according to the jurist Abû Nasr, will take effect with reference to all the lands. The same principle applies to a dedication made in health. The essential point to consider in determining the question what is dedicated and what is not, is the intention of the donor.[2]

A woman instructs her neighbour to make a *wakf* of her house to a musjid with the condition that whenever he should need it he may sell it for his private purposes, and a document is drawn up in which this condition is not mentioned. The jurist Abû Jâfar declares, that if the document was read to the woman so that she heard and understood it, and then again assented to the *wakf*, the

[1] و هذا لا يختص بالوقف بل البيع و سايرالتصرفات يكون كذلك
Kazi Khan, p. 326.

[2] *Ibid*, p. 325.

LECTURE IX. dedication will be valid. But if the document was never read and explained to her, it will not be valid.[1]

SECTION II.

WAKF IN FAVOUR OF CHILDREN.

If a person make a *wakf* in favour of his children according to their number and their legal shares, and also provide therein that the female children should get no share, unless they are widows, and that after the children the *wakf* should be for their children, and their children's children and their descendants, *on condition, that if any one of them should die leaving children, his or her share should go to such children,* the aforesaid condition would refer to all.[2]

If a person make a *wakf* for his children (*awlâd*), both males and females are included.

If a man say this is a *wakf* for my sons[3] and he also has daughters living at the time, the daughters will be included; because when a person has got sons and daughters, they are mentioned in the masculine gender, and so also even should the children be all daughters.

But should he make a *wakf* for daughters whereas he has only sons, the *wakf* will be for the poor and not for the sons [unless it can be shown that it was a mistake and though he used the term daughters he meant sons.][4]

The children of a daughter are included in the term "descendants" (ذریت). That is, if a person make a *wakf* for his descendants or posterity, the son's children and daughter's children will both be included.

[1] *Ibid*, p. 326.

[2] Radd-ul-Muhtar, III, p. 671.

[3] The Persian word *farzand* means a son, but in the common acceptation of the term especially in its plural form it applies to both male and female offspring.

[4] From the *Asaâf*.

If a man were to make a *wakf* for the descendants, without mentioning the order in which they should enjoy the income of the *wakf*, the near and the remote will take equally, in other words the division will be *per capita*. For example, if a man were to say, "I make this *wakf* in favour of Zaid's descendants in perpetuity as long as his line lasts," Zaid's children and grandchildren will be entitled to share equally and there will be no difference between son's children and daughter's children, they will take equally.

This principle applies where no order of succession is indicated by the specification of the line or generation (بطن). Where the order of the line is not given (*e. g.*, generation after generation بطنا بعد بطن,) the rents and profits will be divided equally among all the descendants, male as well as female, living at the time of the distribution, the one lower in degree getting the same share as the one nearest. And as each person among them dies, his share merges in the *wakf* estate and the entire usufruct is divided among the beneficiaries living at the time of the division. If the succession of lines is given, that is, the *wakf*, is in favour of the descendants "line after line" *batnan-baád-batn*, then it will imply that the nearer line or class takes first and after them the "line" next after.[1]

[1] Khassâf; Mr. Baillie's note will be of interest in this connection.

"It appears from these cases that when two or three generations are mentioned separately and then joined by the word "and," all the generations participate together unless there is something to indicate that one generation is to take in succession to another when the first would have an estate for life in possession and the other estates in tail, as it is termed in England. There seems to be no reason for a different construction if the settlement were on a person and his children. But "with" denotes conjunction as well as "and." A settlement on a person with children, or *bafurzundan* as it would be in Persian, ought therefore, it would seem, to be similarly construed, that is, to him and them jointly. But these words occurring in deeds of grant or gift when accompanied by words signifying

LECTURE IX. If a man make a *wakf* in favour of his *awlâd* and the *awlâd* of his *awlâd* or in favour of the *walad* of his *walad*, the daughter's children will be included.

But if a man were simply to say that it was a *wakf* for his *walad*, then the daughter's children will not be included, for *walad* by itself means his own child "and though it includes in the language of custom the son's children, *that* is owing to the fact that the son's children are descended from the wâkif."[1]

Allâmah Shaik Ali al-Mukaddasi has laid down that if a man were to make a *wakf* in favour of his *walad* and the *walad* of his *walad*, then his own children, the children of his sons and the children of his daughters will be included. And Khassâf and Kazi Khan have adopted this view.[2]

If a man were to declare that the *wakf* was in favour of the sons of his *awlâd*, or his *akriba* or his brethren, the females will be included.

'generation after generation' have been usually construed as if they conferred no estate on the children and merely converted an estate for life into one of inheritance. This is agreeable to the English law, according to which when an estate is given to a man and then to his heirs the two estates combine and form one estate in fee-simple as it is termed. I am not aware of any authority in Mahommedan law for a similar construction and indeed the insertion of the words in question in a deed of gift seems to be altogether superfluous for a gift being absolute in its own nature does not require them. But the construction having been adopted, the formula *bafurzundan* &c. seems to have come into common use even among Hindus for enlarging estates, that would otherwise be only life-tenures, into estates of inheritance or absolute ownership." See S. D. A. Reports, Calcutta for 1853, p. 648.

[1] "This is the approved doctrine and Kazi Khan states it to be the correct view on the basis of the opinion of Mohammed in the *Siyar-ul-Kabîr*. So also in the Asaâf; it has been adopted by Kazi-ul-Kuzzat Nur-ud-din of Tripoli, and his disciples Shibli, Ibn-i-Shahna, Ibn-Najim, Hanouti &c;" Radd-ul-Muhtar, III p. 672.

[2] "Khassâf is an Imam whose worth has been testified to by Shams-ul-Aimma Halwâni who has declared that Khassâf's views are adopted every where."—*Ibid*, p. 672.

When a masculine term is used collectively it includes the females. Lecture IX.

If a person make a *wakf* in favour of his *walad*, and after that upon their *awlâd* and so on, *batn* after *batn*, and provide also that should any one of them die leaving children (*walad*), then his or her share should go to his or her *walad* (child), if such person should die before becoming entitled to a share in the rents and profits, leaving him surviving a child, the latter will take his place and become entitled at the distribution of the profits to the share of his parent. If the wâkif die leaving him surviving several children A, B, C, D, and E, and then A dies leaving certain children, the share of A would go to his children, in accordance with the condition laid down by the wâkif. And then B dies, leaving several children and grandchildren by a predeceased child. Question is, would such grandchildren be entitled to share in the interest of B along with his children? Sabki has answered this question in the negative. He holds that B's share would go entirely to the children, and the grandchildren will be excluded. On this point Khassâf agrees with him. But Khassâf holds that upon the death of the last surviving member of the first group, *viz.*, the children of the wâkif, the rule will cease to operate; that is, if E, the last surviving son of the wâkif, dies leaving a child, his share will not go to this child, but the entire income will be divided among the grandchildren of the wâkif, that is, members of the second class, the same rule applying as in the previous case, *viz.*, the share of each member of this class, upon his death, will descend to his children until the class is exhausted, when the distribution would take place according to the number of the third class. According to Khassâf, therefore, the members of each class take *per*

Lecture IX.

Distribution *per stirpes.*

capita. According to Sabki, the distribution is *per stirpes.* He holds that as the members of each class die, their shares descend to their children respectively. Jalâl Suyûti differs from both Khassâf and Sabki. He holds that when any member of one class dies leaving children and grandchildren by a deceased child, the grandchildren and children share in the interests of their grandparent, that is, the grandchildren take the share of their parents, the distribution being *per stirpes.*[1]

The *Ashbâh* agrees with Sabki, and is followed by all moderns.

The result is, that when the adjunct '*waw*' (and) is used between the lines, then after the extinction of each line the distribution begins again, but when the word *sum* (then) is used, the division continues *per stirpes* throughout. And this view is apparently adopted by the majority of Shâfeï lawyers and some of "our own." The consensus of opinion is, that when a person dies during the lifetime of his father leaving him surviving a child, that child takes his father's share in the interest of the grandfather but acquires no interest in that of his uncles.[2]

Wakf for lineal descendants.

If a person makes a *wakf* for his *lineal* descendants, the children of daughters will not be included, unless those children are the offspring of husbands who are the lineal descendants of the wâkif. If a woman make a *wakf* for her *ahl-i-bait* or her *jins*, her children will not be included unless they are the children of her husband belonging to the same *kowm* or tribe as she.

When a *wakf* is made by a person in his own favour and his children and descendants (*nasl*) or posterity, it implies that the wâkif shall apply the proceeds of the *wakf* during his own lifetime for his own purposes, and

[1] *Ibid.* [2] *Ibid.*

that after him the proceeds shall go to his children and then to the grandchildren; such a *wakf* is valid according to Abû Yusuf, and the *Fatwa* is according to his views, that is, decisions are passed according to him.

When a man makes a *wakf* for his child (*walad*) and does not mention that it will enure to the benefit of succeeding generations on the extinction of the first, the *wakf* will go to the poor. But if he uses the term *awlád*, *nasl*, *akab* or *khalaf*, the *wakf* is for his descendants, male as well as female in perpetuity. If the wâkif mention three generations as the recipients of the benefit of the *wakf*, it is tantamont to his declaring that it is a perpetual *wakf* in favour of his descendants, and will be applied to their benefit as long as any of them are alive.

Mention of three generations equivalent to perpetuity.

If a *wakf* is made in favour of children specifically named, the others not named, will be excluded.

A settlement in favour of A. and after him for his children (generally) will include all the children, both males and females.

If a man were to say, "this *wakf* is for my *walad* and *their* children *(awlâd)* and their children's children (*awlâd-i-awlâd*,) those of his children who were living at the time of the creation of the *wakf* or who are born afterwards and their children would take, but not the children of his children who had died before the *wakf*.

But if he said, the *wakf* is for my *walad* (child or children) and for *my walad-i-walad* (children's children) and for *their* children's children, then the children of those children who had died before the creation of the *wakf* would participate; for the term "my children's children" refers to all his grandchildren, not merely to the children who are entitled to participate in the *wakf* at its inception.

[1] Radd-ul-Muhtâr, III, p. 678.

LECTURE IX. When a *wakf* is made in the following terms:—

"This *wakf* is in favour of my children that are born and for my *nasl*" any children born afterwards will be included; but if the terms, *their nasl*, had been used the after-born children of the wâkif would not have been included.[1]

If the wâkif were to say, "it is for my *walad* who are born and for their *nasl* and for all my *walad* who may be born hereafter," his after-born children will take but not their chiidren. If he were to say "it is for my *walad* who are born and their *nasl* and for any such *awlâd* of mine that are born subsequently," the children of the after-born children will take though not their parents.

Wakf in favour of the children and the poor.

When a *wakf* is in favour of children without any right of survivorship, as each child dies his interest goes to the poor, for the interest of each is separate. But the case is different where there is a right of survivorship or joint tenancy implied from the nature of the grant. For example, if a man were to make a *wakf* in favour of his children and then for the poor; it is clear that the intention of the donor was that the *wakf* should enure to the benefit of the wâkif's children as long as any one of them was living, and it is only on their failure that the *wakf* should go to the poor; consequently when each child dies his interest goes to the survivors, or his or her child as the case may be .

If a man were to make a *wakf* in favour of his wife and his children, upon her death her interest will not devolve upon his child by her alone but will go to all his children, unless there is any provision to the contrary making her interest descendible to *her* children.

If the *wakf* is made "for my sons," or "for my brethren," the females will be included. If a man were

[1] *Ibid*, p. 679. [2] *Ibid*, p. 680.

to say, "the *wakf* is for my daughters," and he has only sons, the *wakf* will be applied to the benefit of the poor, until a daughter is born to him, or it is shown that the expression had been used by mistake.

If a *wakf* is made generally without any specification regarding the proportion in which the males and females of each line should take the produce, the distribution should take place in the usual proportion of two for each male and one for each female.

The word *nasl* includes the descendants both by males and females.[1]

Akab and *khalaf.*

The word *akab* or *khalaf* includes descendants through males; *âl*, *jins*, and *ahl-i-bait* of the wâkif include those persons who are related to him through the father or grandfather or any other male ancestor. And *Kârâbat-dar*, *Arhâm* and *Ansâb* of the wâkif include all those people who are related to the deceased from any ancestor, male or female. The highest ancestor to which the line would be carried would be the person who first adopted Islam.

If a man were to say, "this is a *wakf* for my *walad* and for my *nasl* in perpetuity and that should any one of them die, his or her share should go to his *nasl*," in such case the entire produce would be divided among all the wâkif's children and *nasl*; and the shares of those among them who are dead will go to their children.[2]

If a person were to make a *wakf* in favour of his children, and make no provision declaring that upon the death of any one of them his or her share should go to his or her children, such share or interest will merge in the general produce and will be divided among the beneficiaries for the time-being. If the wâkif makes a condition that upon the death of any of his descendants, his or her share should go

[1] *Ibid.* [2] *Ibid.*

Preference to propinquity.

to his *nasl*, in that case it would devolve upon all the children of such deceased descendant, and should any of the children be dead, the children of such child would take his or her share. Should he say nothing about the devolution of the share of a deceased descendant, or should he say that the share of such deceased descendant should go to a higher class, and no one of that class is surviving, in both these cases, the entire produce will be divided among the surviving beneficiaries for the time-being among the descendants of the wâkif, and will not go to the poor as long as any of the posterity of the wâkif is living.

If a man were to say that when one of his descendants dies, his share should go to other descendants of the same degree, in that case the nearest in blood would be preferred to the one more remote; and if there be none of that degree, the share would merge in the general estate. For example, if a person die leaving him surviving sister's children and paternal uncle's children, the latter would take his share in preference to the former, being of the same degree though remoter in blood.

According to Kazi Khan, if a person were to say, "this land of mine is *wakf* on my *walad* (child)," it will go to his own children, and male and female will receive equal shares unless he restricts the *wakf* to male children alone. If there be no child of the wâkif, the property would be *wakf* for the poor and not for the remoter descendants of the wâkif. If at the time of the *wakf* there was no child of his loins living, but there was a son of the son living, he would get the benefit of the *wakf*. When a man says "this land is *wakf* or *sadkah-i-moukoofa* for my *walad* and *walad's walad*," the daughter's children will be included. So if he used the expression *awlâd*, the children of sons and daughters are equally included. According to Mohammed, *walad-i-walad* includes the children of daughters.

Abu'l Kâsem's dicta respecting devolution of interest.

If a person make a *wakf* of his land for his *walad* (issue of his loins) and after him or her for the benefit of the poor, upon the death of such *walad*, according to Abu'l Kâsem, the produce will go to the poor. If he says "this is a *wakf* for my *walad* and my *walad's walad* and after them for the poor" according to Abu'l Kâsem, the produce will be applied to his children and children's children and on the death of the last surviving of the wâkif's children's children, the produce will go to the poor and not to the descendants in the third degree. But if he were to say for my *walad* and my *walad's walad* and my *walad's walad's walad*, so that the third generation is, (expressly or impliedly,) included, the produce would be applied to his descendants in perpetuity, as long as any of them be surviving, and it will not be given to the poor so long as any of his descendants, however low, may be in existence. It is the doctrine of the jurist Abû Jafar and Hillal, that when the wâkif has mentioned three generations, it will be applied to his descendants always as long as they are in existence and the near and remote will be equally entitled to the benefit thereof, unless the wâkif has provided that the nearer shall be preferentially entitled, or has said "line after line"[1] or "for my children and after them for their children," and so on. In such cases the commencement of the division will be made as provided for by the wâkif. If a person make a *wakf* of his land for his two sons and declare that it is *sadkah-i-moukoofa* for them, the produce of the land on their death will be applied for their children and descendants in perpetuity.

Shaikh Imam Abû Bakr Mohammed ibn Fazl has declared that when a *wakf* is in favour of two children, upon the death of one of them leaving issue, his share of the

[1] *Batnan baâd batn.*

LECTURE IX.

Reservation of right of survivorship.

profits will be given to the poor until such time as the other son of the wâkif also is dead, when the entire *wakf* will be devoted to the benefit of the grandchildren, *unless the wâkif has provided that, upon the death of any one of the immediate beneficiaries, the produce will go to the survivor or to the issue of the deceased.*

When a person makes a *wakf* of his land for his children (*awlâd*) and destines its ultimate appropriation for the poor, upon the death of each beneficiary the entire produce will go to the survivors, and it is only upon their failure that the benefit of the *wakf* would accrue to the poor. But as long as any of the *awlâd* are surviving nothing would be given to the poor.

When a *maríz* (a person labouring under a death-illness) makes a *wakf* of his land in favour of his *walad* and *walad's walad* in perpetuity as long as his *nasl* exists, upon the death of the testator (according to all the jurists,) the *wakf* will not be valid in favour of the heirs, but will be valid, (according to Abû Hanifa, Abû Yusuf, Zuffer and Hassan,) in favour of the non-heirs, *i. e.*, the grandchildren, in respect of one-third of the estate, "for the *wakf* of a *mariz* is like a will and is valid so far as the third of the estate extends when it is in favour of a non-heir."

"When a person in sickness appropriates his land for his child and his child's child and leaves no other property besides it, one-third of the land becomes appropriated for the benefit of the child's child, whether assented to by the heirs or not, and the other two-thirds form the property of the heirs, if the appropriation is disallowed by them, but if it is allowed by them the two-thirds are to be divided between the child and the child's child equally."

When a man has made a *wakf* for his son and for his children and for his children's children in perpe-

tuity so long as any one among his descendants is alive, Abu'l Kâsem says the produce will be divided among the wâkif's son's children *per capita*, the female and male taking equal shares. And he was asked regarding the children of daughters and he said they would be entitled, because they are the *awlâd* of his *awlâd*.

If a person make a *wakf* for the poor, and his children fall into poverty after his death, the mutwalli should spend a suitable portion of the income for their support.

The beneficiaries not entitled to partition.

When a *wakf* is made in favour of two or more individuals, they are not entitled to a partition of the property in proportion to their share of the profits. The mutwalli, however, has the power to make such arrangements as he deems necessary, consistently with the provisions of the wâkif, for the due cultivation of the *wakf* lands or occupation of the *wakf* premises.

A *wakf* in favour of heirs during death-illness.

A woman labouring under a death-illness makes a *wakf* for her two daughters and after them for their daughters and daughter's daughters and so on, and on failure of their issue for the purposes of a mosque. She dies leaving her surviving the said two daughters and a sister[1] who does not consent to the *wakf*. In such a case, the *wakf* will be valid respecting one-third of her estate and the remaining two-thirds will be divided among the heirs, in proportion to their legal shares. The income of the one-third, which is *wakf*, will also be divided among the heirs in proportion to their shares until the death of the two daughters, when the produce will go exclusively to their children. Similarly, if the wâkif had said, "I devise by way of *wakf* the produce of this land after fifty years to my children's children," it would be valid. The reason is that, though a testamentary *wakf* in favour of an heir

[1] The sister takes a share with the daughters under the Sunni law, but not under the Shiah doctrines.

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LECTURE IX. is not valid, it is valid in favor of his or her children, and accordingly when the other heirs do not consent,—the one-third, with reference to which the *wakf* would be valid, if not made to an heir, will be set apart and its produce will be distributed among all the heirs, the immediate beneficiary included and upon his or her death, the produce of this one-third will be divided among his or her children.

A dedication or settlement in favour of one's children *(walad)*, and on their extinction in favour of the poor is a lawful *wakf*. There is some difference among the jurists respecting the persons who would be entitled to share in its benefit. Hillal[1] declares that the children of the children will participate in the benefit of the *wakf* if they be in existence at the time when the produce or income becomes distributable, whether they were or were not in existence at the time of the dedication. This view has been adopted by the jurists of Balkh.[2]

Yusuf ibn Khâlid Sâmâni is of opinion that the benefit should be restricted only to those children who were in existence at the time of the actual dedication. Further, according to him a grandchild will not take a share as long as there is a child born before the produce became distributable. If at the time of the distribution there is no child of the wâkif, the produce will go to his grandchildren.

When a person declares the *wakf* to be in favour of his children and grandchildren, all of them who happen to be in existence at the time the produce comes into existence or becomes distributable will participate in its benefit.

[1] Hillal ibn Yehya ibn Muslim Basri died in the year 456 A. H. He was a disciple of Yusuf ibn Khalid Basri who himself was a disciple of Abû Hanifa. Some say he received his legal education under Abû Yusuf and Zuffer. He was called Rawi because he followed implicitly the usages of the people of Kufa. Radd-ul-Muhtâr, III, pp. 676-680.

[2] Whose views are adopted in India.

When a dedication is made in favour of "the children and the progeny" (*walad* and *nasl*) and at the time there is only one grandchild but subsequently a child is born to the wâkif, both will participate. Similarly, if a person declare a *wakf* to be in favour of his children, who are in existence and for his *nasl*, children born after the *wakf* will be included as his *nasl*.

When a person makes a *wakf* in favour of his *infant* (صغير) children, in that case such of his children alone will be entitled to share as were infants at the time of the *wakf*, for though infancy is a quality which ceases, yet it is such a quality which never comes into existence again, and it is therefore tantamount to specifying the children by name.

If a dedication is made for a child and there is born to the appropriator another child, within six months from the date when the produce of the *wakf* came into existence, this latter child will share with the former in such produce. If the child is born over six months, it will not share with the first in the produce as the presumption is—it was not in existence at the time the produce came into existence. If a person make a *wakf* for his child at a time when he has no issue and no child is born to him within six months from the time the produce came into existence, such produce would go to the poor, though subsequent accretions would go to the child.[2]

Section III.

WAKF ON THE KINDRED.

The terms *âl*, *jins*, and *ahl-i-bait* of the wâkif include those persons who are related to him through the father or

[1] The time when cultivation takes the shape of grain is regarded as the time when the produce is in existence. [2] Kazi Khan.

LECTURE IX.

Wakf in favour of the *akriba* or kindred.

grandfather or any other male ancestor. And *karâbat-dâr*, *zu-karâbut*, *arkân* and *ansâb*, include those people who are related to the deceased through any ancestor male or female. The highest ancestor to which the line would be carried would be the person who first adopted Islam.

Abû Yusuf and Mohammed have said, that by *karâbat* is to be understood every one related to a person through a common ancestor up to the farthest back in Islam either on the father's or the mother's side, and whether within the prohibited decrees or not, and that the near and the remote are alike in this respect, whether the word be in the singular or the plural. But according to Abû Hanifa, when the settlement is made in the singular, as for instance "on my *karâbat*—on a person of my *karâbat*," it is the nearest of the relatives within the prohibited degrees that enters into the benefit of the *wakf*, while if the settlement be in the plural, as for instance, "on persons of my *karâbat* or on my *akriba*" (or relatives,) the whole of those above-mentioned are included so that the words are applicable to two or more. With regard to the meaning of Abû Yusuf and Mohammed in the words "most remote ancestor in Islam," some say that it is the most remote who adopted the Mussulman religion, but others the most remote ancestor since the promulgation of Islam whether he adopted the faith or not.

If a man say, "this is a *wakf* for my *akârib*, *ahl-i-bait*, &c.," according to the disciples, even if there be only one of this class, the trust will take effect.

Poverty has reference to the time of distribution.

When a man makes a *wakf* for his poor relatives, the poverty has reference to the time when the income becomes distributable. But the recipient of the benefaction must be one who has no relation liable legally to maintain him or her, for example, a husband, a father, &c.

[1] See Appendix for further explanation of the terms used here.

When a *wakf* is made in favour of one's children or relations, all those who are existing at the time when the produce comes into existence, though born after the creation of the *wakf*, are entitled to share. LECTURE IX.

What has been said as to a person's *akriba* and *zav'-il karâbat* is equally applicable to his *arhâm* and *zav'-il arhâm* and *ansab* and *zav'-il ansâb*—all these terms implying the same thing.

When a person has said "This is a *sadkah* settled on the poor of my kindred or the poor of my children and after them on the indigent," the settlement is valid, and the persons entitled are those of them who are poor at the time when the produce comes into existence, according to Hillal, whose opinion "we" approve and the *fatwa* is in accordance with it. Similarly, if instead of "the poor," the words of dedication were "the indigent and the needy of my kindred." If one after making a settlement on the needy of his kindred and then on the poor, should die leaving a poor son, Abû Yusuf holds that the son would not come within the meaning of kindred and this seems correct. When there are poor of an appropriator's kindred in another city than that in which he resides, the produce is not to be sent to them but is to be divided wholly among those of his own city, though if the superintendent should send any of it away to them he would not be considered as committing a breach of trust.[1]

In a gift to the poor, a child *en ventre sa mere* is not included.

A *wakf* to those who are *sâleh* (pious) includes those men who are pure, and nobody doubts them or makes any imputation against them and they follow the path of rectitude, use no evil expressions, are not drunkards and do not revile good women, and are truthful and honest, "these are the *sâleh*, men of purity and goodness."

[1] Baillie, p. 587.

LECTURE IX.

A *wakf* to the "nearest" among all mankind.

If a man make a *wakf* for "those who are nearest to him among all mankind," and after them for the poor, and he has a child, a father and a mother, or a father or a mother, then the produce will go to the child, though it be a female, for she is nearest to the wâkif. And after the child to the poor, and not to the parents, because the wâkif did not state, "to the nearest and then to the nearest." If the wâkif had no child, but only parents, the produce will go to them equally. If the wâkif left a mother and brothers, the produce will be given entirely to the mother. If he leaves a paternal and maternal grandfathers and brothers, the brothers will take the whole produce.[1]

If the wâkif has a daughter's daughters and a son's son's son, the daughter's daughter as the nearest will be entitled to the benefit solely.

But when a man makes a *wakf* on the nearest of his *karâbat*, in that case his parents and children will not share as they are not included in the term, *karâbat*.

If a person were to declare, "I make a *wakf* for my *akârib* on condition that the distribution should com-

[1] Some jurists hold the paternal grandfather would take the entire produce, being supposed to stand in the place of the father.

"When a person has made a settlement on the nearest of men to him and after that to the indigent and has a son or a father, he enters into the benefit of the *wakf*, though if his words were 'on the nearest of men among my *karabat*' they would not enter into it. And if he has a son or a daughter and both parents, the son or daughter alone is entitled and on their death the produce belongs to the indigent and not to the parents; while if he have his parents only the produce is to them in halves and if either should die his or her half would pass to the poor. In like manner, if he have ten sons and one of them should die his share goes to the indigent. And if he has a mother and brothers or a mother and grandfather, the produce is to her alone to the exclusion of the others, she being the nearer. The same is true of the father also. And a father is nearer than a son's son, but a son's son is preferred to a full brother and a daughter's daughter to a son's descendant in a lower grade. So also a daughter's daughter's daughter is preferred to a full sister." Baillie, p. 588.

mence with the one nearest in the *nasab* (consanguinity) or *karâbat* (relationship), and after him for one who is nearest to him and so on," and the wâkif has two brothers or two sisters, the distribution would commence with the brothers or the sister of the full blood and then with those who are uterine. And if one of them is consanguine and the others uterine, the uterine will take first. This is according to Abû Hanifa. According to the disciples they will share equally. Maternal uncle and aunt are preferred to consanguineous or uterine brother of the father. So a full paternal uncle is preferred to a consanguine or uterine brother or sister of the mother. A full paternal uncle and aunt are preferred to a maternal uncle and aunt. This is according to Abû Hanifa. According to the disciples, they take equally. In both these cases the views of the disciples are adopted as law.

The same rule is applicable to the offspring as to the "roots," bearing in mind that according to the disciples there is no difference whether they are connected through males or females or through one side or the other, *viz.*, the father's side or the mother's side.[1]

The word *karîb* (near) is not confined to the *karâbat* alone. Therefore, if a man instead of saying "the *wakf* is for one nearest to me among my *karâbat*" were to say "the *wakf* is for one *nearest* to me among all people," this would include both *karâbat* and *ghair karâbat*, and consequently parents and children will be included in the *wakf* though they do not fall in the category of *karâbat*.

If a man were to say, "the *wakf* is for my children, and if any of them should die his share shall go to one of his degree, the nearer being preferred to the one more remote," and there are the wâkif's sister's children and paternal uncle's descendants, the share of the deceased beneficiary

[1] Kazi Khan.

LECTURE IX. would go to the wâkif's paternal uncle's descendants and not to the children of the wâkif's sisters. This is contrary to the *Fatwa* in the *Khairiyeh* in which the wâkif's sister's children are preferred.

A person may create a *wakf* lawfully in favour of his kindred (*karâbutdar* or *karâbut* or *zû-karâbat*,) and no preference will be given to males over females. And in the *Ziadât* it is stated that the grandparents and grandchildren will participate in the benefit of the trust.[1] A wife, however, is not included in the term *karâbat* or *akriba*.[2]

If a person declare his property to be *wakf* for his *nearest* kindred and he has a consanguine sister and daughter's daughter's daughter, the *wakf* will be in favour of the latter for she is nearest in blood to the wâkif being his own descendant, however low in degree.

When a *wakf* is in favour of the *poor* kindred, such kindred as are in indigent circumstances will alone be entitled to share in its benefit. With reference to the question who are indigent and who are not, the Alamgiri states the principle in the following terms :—"All persons who are accounted in law as the legitimate recipients of the *zakât* or the poor's rate, must be regarded to be *poor*. A person possessed of only a dwelling-house and a servant is held to be poor, and properly entitled to receive the *zakât*, as well as the benefit of a *wakf* for the poor."

"So also when with this, he has a sufficiency of clothes without anything superfluous or house furniture, that cannot be dispensed with. But if he have an excess of 200 dirhems above his clothes and furniture, he is to be accounted rich and will not be held entitled either to the *zakât* or to the benefit of a *wakf*. So also if he have two dwelling-houses or two servants and the superfluous house or

[1] Kazi Khan and Radd-ul-Muhtâr, III, p. 681.

[2] See 9 Bombay High Court Reports, p. 19.

servant is of the value of 200 dirhems, he is to be accounted rich so as to render it unlawful for him to participate in *zakât* or *wakf*, but not so as to render him liable to the former. And, though the surplus above his dwelling-house, or the surplus above his clothes, or his furniture should not each by itself be of the value of 200 dirhems, yet if all taken together are of that value, he is rich and cannot lawfully participate either in *zakât* or in *wakf*. And if he have land of the value of 200 dirhems, though the income from it be insufficient for his maintenance still he is rich, according to what is approved. Though he should have plenty of property not immediately available or in debts owing to him by other persons, he may be allowed to take of the *zakât* or the *wakf*, for he is in the condition of a traveller; yet if he can borrow, it is better for him to do so than to receive from a charity."[1]

Test of indigence according to the Alamgiri.

"Every one who is entitled to maintenance from another, and who may take it without his consent or the order of a judge, or to whom the judge may award it out of the property of an absent person,—and every person, the profits of whose property are so mixed up with those of another that neither can be accepted as a witness for the other, is accounted rich in respect of *wakf*, on the strength of the wealth of his maintainor or person with whom he is so connected, and of this parents and children and grandparents are examples. But persons, who though entitled to maintenance from another, yet cannot take it without his consent, or the order of a judge, and to whom the judge cannot assign maintenance against another during his absence; and persons, the profits of whose property are so distinguishable from those of another that each may be accepted as a witness for the other—are not to be account-

[1] Though apparently there is one opinion of Abû Hanifa which is opposed to the view given in the text, which is that held by the disciples.

LECTURE IX. ed rich on the strength of the wealth of their maintainors; and of this, brothers and sisters and other relations within the prohibited degrees are examples.[1] When a poor woman has a rich husband she is not to *receive* from the *wakf*, but when a poor man has a rich wife he may receive from it."

Kazi Khan. Kazi Khan lays down the following rule on the subject, which, however, he says must vary with the changing circumstances of the times. A person is called *fakîr* (indigent) who has only a lodging (and nothing more,) and he would be entitled to both *zakât* (poor's rate or religious alms) as well as the benefit of a *wakf* (for the poor). Similarly, a person, who has only a lodging (but no wherewithal for subsistence,) though he may have an attendant, is a *fakîr*. A person, who has only a few necessary raiments and nothing else, is a *fakîr*. One who has household effects of the value of two hundred dirhems will be considered *ghani*, that is, a person enjoying competence. According to Yusuf ibn Khâlid Sâmâni, the possession of 50 dirhems would bring a person within the category of *ghani*.

Radd-ul-Muhtâr. According to Abû Yusuf, the owner of a piece of land which is worth 200 dirhems, though its income may not be enough for his support, is not indigent; but Mohammed ibn Shahna, and Mohammed Ibn Makâtel of Rai would regard him as a *fakîr*. "The words of Abû Yusuf, however, are words of caution, and the saying of Ibn Shahna contains much elasticity." The author goes on to say, that a person ostensibly possessed of means, though having been overtaken by some calamity cannot have the immediate use of such property, may be regarded as an indigent. He also adds that a person who, with the exception of a debt owed by an insolvent, owns no other property

[1] Alamgiri II, p. 484; Baillie, p. 589.

will be regarded as an indigent. From these statements it appears that the question, whether a person is or is not indigent, in other words, a pauper, is dependent upon special circumstances and cannot be answered without reference to the requirements and exigencies of the society among whom the question arises.

When a *wakf* is made for the indigent kindred of the grantor, and one of his kinswomen gives birth to a child within six months of the date upon which the produce of the *wakf* comes into existence, such child will not be entitled to a share in it, for a child *en ventre sa mere* cannot be regarded as coming under the category of indigent kindred. Such child will be treated in the same way as a kindred, who was *ghani* at the time the produce came into existence and became indigent afterwards. This person though not entitled to a share in that produce, will participate in all future income.

When a *wakf* is clearly intended for more than one person comprehended in a class, and there is only one person of that class existing, he will take half of the produce and the remainder will go to the general poor. If, however, it appears *primâ facie* that the whole benefit is intended for persons of that class, independently of their number, such person will take the entire benefit. For example, if a *wakf* is made for the benefit of the indigent among the posterity of A., and there is only one such person in existence, the entire income of the *wakf* will go to that person. But if the *wakf* was created for the paupers among the posterity of A. and there happens to be only one he takes half of the produce, the remainder goes to the poor in general.

Meaning of the term "orphan."

A *wakf* made for the orphans of one's kindred is subject to the same principles. An orphan or *yeteem* means an infant child who has no father living, though the mother

LECTURE IX.

Age of majority.

and the grandfather may be alive. The condition of orphanage ceases on the attainment of puberty. In the absence of any indications of puberty, the completion of the 15th year is regarded by Abû Yusuf as the age of majority. Abû Hanifa holds that the completion of the 19th year is the age of majority for men and the 17th year for women, whilst Zuffer is of opinion that the age of majority should be the same in both cases, namely, the completion of the 18th year.

If a person make a *wakf* of his property for his poor kindred, will the mutwalli be authorized after the wâkif's death to give a share of the produce to his indigent grandson? Most of the jurists have answered this question in the affirmative and the Fakîh Abu Lais has stated that in the *Ziâdât*, Imam Mohammed has held the same view, though apparently Abû Hanifa and Abû Yusuf have held otherwise.[1]

A *wakf* for the kindred, residing in a particular locality.

Where a *wakf* is made for the benefit of the wâkif's kindred residing in a particular locality and after them for the poor, would the kindred be deprived of the benefit of such *wakf* if they leave their residence? Fakîh Abû Bakr of Balkh has declared that if the wâkif's kindred who are constituted the beneficiaries of the *wakf* are limited in number and capable of being specified, in that case

[1] In the Alamgiri, preference is apparently given to the views of Abû Hanifa and Abû Yusuf :—

"In a *wakf* on '*karîb*' the produce is divided according to heads, the young and the old, the male and the female, the poor and the rich being all alike because the noun is equally applicable to all. But neither the father of the appropriator nor the children of his loins are included nor his grandfather, according to the Zâhir-ur-Rewâyut. A man makes a settlement on the needy of his *karâbut* and then dies. Question.—Can the mutwalli give any portion of the produce to a son of the appropriator's son when poor? According to Abû Hanifa and Abû Yusuf he cannot, for the child of a child according to them is not included in the term *karâbut*." See *ante*, p. 329. There can be no question that the views of Abû Lais are accepted by the sect.

their right to the benefit of the *wakf* is ambulatory and will go with them wherever they go. But if they cannot be specified and are not limited in number, in that case the right of any one of the kindred who leaves the locality will drop and the entire produce will be distributed among those living on the spot, and when none of them are in existence it will go to the poor. And Abû Lais has stated that should any one of the kindred (so leaving the place) return to that locality, the right would revive.

Should a *wakf* be made for one's *akriba* but the words *their descendants* are not added, still they would be included, as the descendauts of *akriba* are also *akriba*.

If a person make a *wakf* for his *akriba* and after them for their descendants, these will not share in the benefit of the *wakf* until the first stock is exhausted.

A *wakf* with a discretion to the trustee.

A person makes several dispositions by will and creates a *wakf* of his land for the poor and authorises his executor "to give to whomsoever *he* likes and whatever *he* likes," in such a case it is lawful for the executor of the *wakf* to give to his parents, his wife and kinsmen, if they are poor or in need, and it will, in the main, be regarded as a *wakf* for the poor.

Wakf in favour of neighbours.

When a man has made a settlement on his neighbours, the produce ought to be expended, according to analogy, on all who live adjacent to him, but, on a liberal construction, it is for those who assemble together with him and come to the masjid or place of worship of the *mahallah* or quarter, and this is approved. Residence is the condition, according to the plain doctrine of Abû Hanifa, whether the resident be proprietor or not, and this also is correct. When the inhabitant is not the proprietor, the benefit of the *wakf* is to the resident and not the proprietor. The neighbours, whether Muslim or infidel, male or female, free

Lecture IX. or *makatib*, minor or adult, are entitled and the produce is to be divided among them according to the number of heads, the superintendent being responsible if he give more to some than to others. An *umm-i-walad*, *mudubbur*, or absolute slave has no right to participate, nor a debtor who is imprisoned within the *mahulla* for debt, nor, on a liberal construction, the son, father, grandfather or wife of the appropriator nor the child of a child though he be a neighbour. But his brothers and paternal and maternal uncles do participate.

If among the appropriator's neighbours there are some who have gone to another *mahulla*, selling their mansions to other persons who have come into them after the ripening of the crops, but before they are gathered, these are to be regarded as neighbours who are such at the time of the division of the produce. And if a person should make a settlement on his neighbours when residing in one house, but should remove to another even though it be a merely rented house, and *reside* therein until his death the produce will go to his last neighbours. And if a man, after making a settlement on his neighbours, should remove to Mecca and die there, the produce would belong to his neighbours in Mecca if he had taken a house there, but if he had gone on a pilgrimage only, it would belong to his neighbours in his own city. If a man have two mansions, in one of which he resides and in the other of which he keeps his merchandise, the produce is for the neighbours of the house in which he lives. If he have two mansions and a wife in each, the neighbours of both are entitled to the produce, though he should die in one of them. So also, though one of the houses be in Basrah and the other in Kûfa, he having a wife in each. And if a person should make a *wakf* for the poor of neighbours without referring to himself, as for instance by omitting to say "my neigh-

bours," it would be the same as if he had said "my neighbours." If a man should fall sick and be removed by his son to another *mahulla* or village and die there, his first neighbours would be entitled, this being no proper removal. But if a woman inhabiting a mansion should make a settlement on her neighbours and afterwards marry and be taken to the house of her husband and die there, her neighbours are those of her husband. So also, when a man has married a woman and removes to her house, his neighbours are changed to hers, unless he has left his furniture in his own house, when they say his neighbours are those who were so before his removal.

When it is not known who are a man's neighbours, the produce is not to be divided until witnesses testify to the house in which he died and then a distribution is to be made among the neighbours of that house. And if a neighbour should claim as being poor and the fact of his poverty is not known, he must be put to the trouble of producing witnesses to prove it.

If a person whilst in health make a *wakf* for the poor, upon whom should the produce be spent? Nâtiki has declared that it should be applied for his (poor) children, then for his kinsmen after them for his slaves, then for his neighbours and then for the people of the city, with reference to his proximity; and children and females will be included in the distribution among neighbours.[1]

[1] The foregoing principles are from the Alamgiri and the Radd-ul-Muhtâr.

Lecture IX.

Section IV.

CONDITIONS IN WAKF.[1]

A *wakf* with an option.

When a dedication is made subject to the exercise of an option on the part of the wâkif, according to Abû Yusuf, "the *wakf* as well as the condition" is valid, provided there is a determinate period fixed, within which the option should be exercised. For example, if a man were to say, "I constitute this house as *wakf*, but I shall have an option to set it aside within three days," if the option is not exercised, the *wakf* becomes absolute after three days, but if the time is uncertain and wanting in specificness, the *wakf* is invalid.

The jurist Abû Jâfar holds that the *wakf* should be considered as valid and the condition void *(bâtil)*. Hillal and Mohammed hold that the reservation of an option invalidates the *wakf* itself, whilst Yusuf ibn Khâlid declares that the *wakf* is valid in all cases, the condition alone being void. And this seems to be the generally received doctrine.

If a person were to make a dedication for a specific period of time, say, for a day or a month without any additional words, it would take affect as a lawful *wakf* in perpetuity. But if he were to say that it will be a *wakf* for a particular month, and on the expiry of that month, the *wakf* will be void—in such a case, the dedication would be void *ab initio*.[2]

If a man were to say "when to-morrow comes my land will become *sadkah-i-moukoofa*" or "when I become its *mâlik*, the land will be *wakf*," it is unlawful, for the creation of a *wakf* cannot be made dependent on the happening of a contingency.

[1] The principles stated in this section are taken, in the main, from the Fatâwa-i-Kazi Khan.

[2] Compare the Shiah law on the subject.

If a person were to say "my land will be *wakf* after my death for a certain number of years," it will take effect after the death of the declarant as a *wakf* in perpetuity. But this applies only to the case of a testamentary disposition by which a *wakf* is intended to be created for a limited number of years. For if the appropriator were to create a *wakf inter vivos* for a limited period, it would be invalid. According to Hillal, the result is that when a *wakf* is endeavoured to be created with a condition which is *dehors* the condition of perpetuity, the *wakf* is invalid. LECTURE IX.

If a man were to say, "my land is *sadkah-i-moukoofa* on this condition, that I shall have the power of revoking it whenever I chose," according to Hillal, such a *wakf* is invalid. Yusuf ibn Khâlid, however, holds that the *wakf* is valid and the condition void. And Abû Yusuf is of opinion that where the time for the exercise of the power is undefined, the *wakf* itself is invalid.[1]

Similarly, if a man were to say "I consecrate this land on the condition *that it will remain my property*, and I shall have the power of selling it whenever I like, and of dedicating the proceeds thereof, "—such a *wakf* is invalid.

When a *wakf* is created conditionally, it is valid, *e. g.*, if a person were to say "this land is *wakf*, if it is mine," in that case if the land was his property at the time, it would constitute a valid *wakf*.

According to the Hanafis, the *wakf* of property belonging to another is validated by the ratification of the real owner; not so according to the Shâfeïs.

If a man were to say, "this land of mine is *moukoofa* for God in perpetuity on condition that I shall have the power to sell it, and with its price to buy another piece of land which will then become *wakf*, subject to the same

[1] This view is adopted as law by the sect.

Lecture IX. incidents as the original *wakf*," both *wakf* and condition are valid according to Hillal and Abû Yusuf. And this is correct.[1]

If the wâkif were to say, "I constitute this my land *wakf* and reserve to myself the power of selling it," though several jurists have held that this is invalid, the correct view is that the *wakf* is lawful, and if the appropriator exercises the power of sale, the proceeds of the sale become *wakf* in lieu of the land.

The wâkif or the mutwalli can sell the property only when the power of sale has been expressly reserved. In the absence of any such power, the Kazi, if he deem it expedient, may authorize the sale of the *wakf* property and a re-investment of the proceeds in any shape conducive to the proper maintenance of the *wakf*.

Where a *wakf* has been made in favour of the public mosque and some great evil seems imminent to Islam to avert which it becomes necessary to borrow the income of the *wakf*, in such case the sovereign is authorized to take the income as a loan.

If the cattle belonging to a *wakf* become unfit for work, the mutwalli is entitled to remove and sell them.

Things belonging to the mosque but not needed may be sold by the mutwalli with the sanction of the Kazi where there is one, otherwise at his own discretion.

When a village in which there exists a brick-built well or reservoir has become completely depopulated, the materials of that reservoir or well may, with the sanction of its wâkif, or in his absence, of the Kazi, be used for the building of another well or reservoir in a contiguous village.

When anything is dedicated to a mosque which afterwards becomes ruined, the subject of the dedication does

[1] Kazi Khan.

not revert to the grantor or his heirs but will be used for the nearest mosque.

When the subject of the *wakf* is unfit for the purpose for which it is intended, the *wakf* will be avoided. For example, if a piece of land be dedicated for a cemetery and a corpse be even buried in it, but if it afterwards appear that the place is unfit for a burial-ground and people are unwilling to use it as such, the dedicator may sell it, for the place is not suited for the purpose for which it is intended, and that circumstance would avoid the *wakf*.

If a land dedicated to some pious purpose has become uncultivated, and owing to its distance from town no person is willing to take a lease thereof and no profit can be derived from it, nor can any buildings be raised upon it, such land may be sold according to Kazi Khan.

Similarly if a *lungarkhaneh*[1] is burnt down, *the wakf* ceases, or if shops are dedicated for a bazar and the shops and bazar are all burnt down, the *wakf* ceases and the land reverts to the heirs of the grantors.

If a road or path which leads to a mosque becomes dilapidated, it can lawfuily be repaired with the funds of the mosque, when it is the only mode by which the members of the congregation can gain access to the mosque. Similarly, if a *lungarkhâneh* is created on the banks of a river and people have access to it only by means of a bridge, if the bridge becomes dilapidated it may be repaired out of the funds of the *lungurkhâneh*.

If a *lungurkhâneh* or musjid becomes ruined, and the place where it is situated is abandoned entirely, its materials may be sold with the permission of the Kazi and the proceeds applied to the purposes of the nearest *lungurkhâneh* or mosque, though some have said it would revert to the grantor's heirs.

[1] A hostel for indigent travellers.

SECTION V.

WAKF-UL-MARIZ; WAKF BY THE SICK.

LECTURE IX.

Wakf by a person suffering from a mortal illness.

Shaik Imam Abu Bakr Mohammed ibn Fazl has stated that *wakfs* are of three kinds—

(1). Those made in health (*i. e.*, to which operation is given in health).

(2). Those made whilst suffering from a mortal malady.

(3). Those made with the object of taking effect after death.

In the case of the first, (actual or constructive) change of possession[1] is necessary as in the case of a *hiba*. In the case of the third, as it would take effect after death, delivery of possession is not necessary, but it will operate only with a reference to one-third of the wâkif's property, as in the case of a legacy to a non-heir.

In the case of the second, it is valid with reference to one-third, but delivery of possession and appropriation (constructive or actual) are necessary as in the case of a *hiba* made in death-illness. And in the *Tahtavi*, it is mentioned that the legal characteristic and incidents of a *wakf*, to which operation is given during illness, are the same as that of a *wakf* to which operation is intended to be given after death, that is, it is valid with reference to one-third of the wâkif's property.[2]

A person suffering from death-illness makes a *wakf* of his house, it is lawful and valid if it does not exceed one-third of his estate, but if it exceeds the one-third and the heirs consent, it would be valid in its entirety, but if the heirs do not consent, the *wakf* will be avoided as regards the excess over a third. If some of the heirs consent and the others do not, the *wakf* in excess of the one-third will be valid in proportion to the shares of the assenting heirs.

[1] *Lit.* delivery of possession and setting apart.

[2] Kazi Khan.

If one of the non-assenting heirs sells his share in the portion of the property respecting which the *wakf* is disallowed and subsequently it is discovered that the wâkif has left other properties besides, so that the *wakf* can be valid in its entirety with reference to the property dedicated, owing to its forming less than one-third of the entire estate of the wâkif, the sale by the heir will not be set aside but he will have to pay the price thereof for the purchase of other property to be added to the *wakf*.

Wakf by an insolvent in death-illness.

If a person suffering from death-illness makes a *wakf* of his house and all his property is involved in (*lit.* surrounded with) debt, the house will be sold and the *wakf* will be set aside. Similarly, if a person were to purchase a house and make it a *wakf*, after which a claim of pre-emption is made in respect of it, which claim is established, in such a case the *wakf* would be set aside.

If a person were to purchase a property under an invalid sale and after obtaining possession were to make a *wakf* thereof, it would be lawful and he will be liable for its price to the vendor. And if he were to turn a house similarly purchased into a mosque it would be valid according to Hillal and all our learned.

The acknowledgment of *wakf*.

If a person make an acknowledgment that some property of which he is in possession is his *sadkah-i-moukoofa*, his statement will be credited and the land will be dedicated to the poor.

If a person says " this land is the *sadkah-i-moukoofa* of my father," and his father is dead, his acknowledgment will be valid; but if his father had died leaving debts and there is no other property of the deceased out of which the debt can be paid, so much of the *wakf* land as is necessary to pay off the debt will be sold and the deceased's liabilities will be paid and the remainder

LECTURE IX. will be *wakf*. If there happen to be any other heir of the deceased who does not acknowledge the *wakf*, his share will be excluded from the *wakf* "that he may do whatever he likes with it."[1]

If a man declares that a particular piece of land was *sadkah-i-moukoofa* for his ownself, or that he should "eat" out of its produce and feed others with it, such a *wakf* is valid according to Abû Yusuf. And the jurists of Balkh have adopted this doctrine of Abû Yusuf and have held that both the condition and the *wakf* are valid; and Sadr-ush-Shaheed has said that the *fatwa* is according to the opinion of Abû Yusuf.

A person makes a *wakf* for the poor on condition that he should maintain himself therewith during his life-time, such *wakf* is valid according to Abû Bakr Askâf. If a person were to say "I have made this property a *wakf* for myself," it would be valid according to Abû Yusuf and after the appropriator's death the property in question will be applied to the benefit of the poor.

Ansâri has stated in his work on *wakf*, that when a person constitutes a *wakf* in the following terms, "This my land is *wakf* for the sake of God in perpetuity and its produce will be applied to my uses as long as I live," and adds nothing further, it is valid; and when he dies its benefit will go to the poor. Khassâf has stated that when a person declares, "this my land is *wakf* or *sadkah-i-moukoofa* in this way that its produce will be applied to my uses as long as I live, after me for my children, and after them for my grandchildren in perpetuity as long as my descendants exist, and should there be none of them then to the poor," such a *wakf* is valid, according to what Abû Yusuf has stated. And in some of the *rawâyets*

[1] This is the case when there is no other proof of the *wakf* excepting the man's statement or *ikrar*.

(authorities) it is said that if a person makes a condition to pay his debts and expenses out of the *wakf*, the condition is valid.

Trusts for the payment of the debts of the wâkif, or for other purposes beneficial to him.

When a man has made an appropriation of land or something else with a condition, that the whole or a part of it shall be for himself while he lives and after him for the poor, the appropriation is valid according to Abû Yusuf and the Shaikhs of Balkh have adapted his opinion, and the *fatwa* is in conformity with it as an inducement to the making of appropriations.[2] There are several ways in which this may be done, as for instance, by a person saying "on condition that he will pay my debts out of the produce," or "when death happens to me, if I should be in debt, that he will begin with the payment of my debts," or "when death happens to such an one, take every year one-tenth share of the produce and apply it to the performance of the *haj* or pligrimage to Mecca on his account or on the expiation of his vows and so and so" (naming something); or "Take every year out of this *sadkah* so many dirhems and expend them in such a manner and the remainder so and so." In all these cases the *wakf* would be lawful. And if the appropriator were to say "This is a *sadkah-i-moukoofa* to Almighty God, [and the mutwalli] will pass its produce to me while I live," without adding anything more, it would be lawful, and after his death, the benefit will go to the poor. So also if he should say, "This my land is a *sadkah-i-moukoofa*, he (meaning the mutwalli) will pass the produce to me while I live, then after me to my child and my child's child and their *nasl* forever, while there are any and when they cease, to the indigent." This also

[1] Radd-ul-muhtar, III, p. 572 ; Alamgiri, II, p. 495 : Baillie, p. 597 ; Kazi Khan, III, p. 328. The Shiah Law is in utter conflict on this point.

[2] See *ante*, p. 280.

would be lawful. So also if he should make it a condition, "That he may maintain himself and his child and pay his debts out of the produce and that when death happens to him the produce of the estate is for such an one, the son of such an one, and his child and child's child and his *nasl*." Or, if he should begin by saying "for such an one and then for himself," it would be lawful as conditioned, the putting himself, first or last, making no difference. A person makes an appropriation for the poor with a condition "that he may eat and feed others" (out of its produce) "so long as he lives and that after his death it is to be for his child and in like manner to his child's child forever while there are any descendants," the *wakf* is lawful with such a condition.

Condition of exchange lawful.

When there is a condition in the *wakf* "that he may exchange the land for other land as he pleases and that the land so obtained shall become *wakf* instead of the first," the appropriation and the condition are lawful according to Abû Yusuf, and so also when there is a condition "that he may sell and make an exchange for the price." And it has been said that Hillal was of the same opinion and the *fatwa* is in conformity with it. Bnt after the exchange has once been made it cannot be made a second time, unless there are words indicative of an intention that he may exchange continually. When the words are "that I may exchange for other land," he cannot exchange for a mansion nor *vice versâ*. But he may purchase *khiraj* land with the price. When the power to exchange is reserved to himself he may appoint an agent for the purpose, but if he should bequeath the power to an executor, the executor of such executor cannot exercise it. And if the power is reserved to another and himself the other cannot exercise it singly, but the appropriator himself may lawfully do so. When the power to exchange is given

An exchange once made debars the exercise of the power a second time unless intention apparent.

to "every one that may preside over this *wakf*," it is lawful, and every president may exercise the power. But when the appropriator has declared "on condition that such an one shall have the power of exchanging," the person authorized cannot exercise the power after the death of the wâkif without an express condition to that effect. The *kyum* or administrator has no power to exchange unless expressly authorized to do so. And when it is made a condition that *he* may exchange, the appropriator may also exercise the power without a similar condition in his favour.

Without an express condition in the *wakf*, the land cannot be sold or exchanged, though it should be saltish and useless. In one place Kazi Khan has said that the judge may order its sale, though there should be no condition to that effect when he thinks it expedient, but in another he denies that the judge has any such power. The most trustworthy opinion, however, is that the judge may lawfully order the sale of land if it be quite useless and there is no income derived from it, provided that the sale is not at an inadequate price.[1]

When a man has said, "My land is a *sadkah-i-moukoofa* to Almighty God for ever, on condition that I may employ the produce as I please," he may lawfully do so. But if he should give it to the indigent, or employ it in pilgrimage, or bestow it upon a particular individual, he cannot reclaim it. And in like manner, if he should say "I have given it to such an one," he has no power to reclaim it. He may give it to one set after another, yet if he were to apply it to himself the *wakf* would be void. It would be different if he had said "on condition that I may *give* it to whomsoever I please."

Where an appropriation is made subject to a condition

[1] Baillie, p. 597; Alamgiri, II. p. 494.

LECTURE IX. that the wâkif shall have the power of giving the produce to whomsoever he pleases, the *wakf* is lawful; and he shall have the power of doing whatever he likes with the income during his lifetime, but cannot make any disposition respecting it to continue binding after his death, nor can he apply the income to his own purposes, (*lit.* cannot eat of the produce himself). His doing so, however, will not *avoid* the *wakf.* But he may bestow it on anybody he likes. A man makes a *wakf* of his estate on condition that the administrator may give the produce as he pleases, this is lawful; and he may give it to both rich and poor. If one should say, "on condition that such an one may give the produce to whomsoever he pleases," it is lawful; and the power may be exercised either during the lifetime of the appropriator or after his death, and the person so authorized may give the income to his own child and *nasl*, and also to the child and *nasl* of the appropriator, but not to himself. [It is not clear what the effect will be, if the person authorized were to take the profits of the *wakf* estate himself. The Alamgiri goes on to say that "the power does not pass out of his hands on his saying 'I have given the produce to myself.'" A mere declaration may not have the power of destroying the power, but will not an unlawful application of the income to his own use amount to breach of trust?][1]

If a person were to say, "My land is *sadkah-i-moukoofa* for the sons of such a one on condition that I may select of them whom I please," it would be as he has said, and he may select as he pleases or give the whole to one; and if he were to say, "I make no selection this year," it would be lawful and the produce would be [divided]

[1] What follows is not recognized by the jurists of Balkh, *viz.*, the passage "but if he were to say, I have given to the appropriator, the *wakf* would be void according to those who say that a man cannot make a *wakf* in his own favour."

among them all equally. And if he were to say "on condition that I may deprive whom I please among them," and he were to deprive them all but one, it would be lawful; and though *by analogy* he should not be able to deprive them all, he has that power also, *on a favourable construction.* But he cannot restore those whom he has deprived and the *wakf* would be for the poor. If he were to say "I have deprived them of the produce of this year," they have no right in that year's produce and it passes to the poor.[1]

If a man were to constitute a *wakf* in favour of the mother of his children *(umm-i-walad)*,[2] subject to the condition that if she marries after his death she is to have nothing, and she does marry but is subsequently divorced; in these circumstances she has nothing, unless it were provided that in the event of being divorced, she should be restored to the benefit of the *wakf.* In like manner, when a *wakf* is for the sons of such an one except those who go out of the city, and some of them go out but return again, or when it is for the benefit of the sons of such an one who are acquiring knowledge, and some of them abandon their studies which afterwards they resume, the parties continue to be deprived of the benefit of the *wakf,* in the absence of any condition to the contrary. And if one should make his land a *sadkah* settled on his child and *nasl* for ever, and after them on the poor with a condition that any of them, who may leave the sect or doctrine of Abû Hanifa for that of Shâfeï, shall lose the benefit of the *wakf;* those abandoning the sect will be deprived of its benefit. Similarly, if he had said when any one of them shall leave the doctrine of the Sunnis and

[1] Fatâwa-i-Alamgiri II, pp. 495 to 501; Baillie, p. 595 *et seq.*

[2] *Umm-i-walad* is the designation given to a female slave who bears a child to her master and thus becomes enfranchised.

become a heretic he shall be expelled; and one of them does apostatize, he is to be expelled. A man and woman are on the same footing; and when it is made a condition that if one should depart from the established doctrine he is to be expelled; and one of them does so and then returns, he is not be restored to the benefits of the *wakf* without an express condition to that effect. In like manner, when a particular doctrine has been specified and there is a condition that if any depart from it he is to be deprived, regard must be had to the condition. So also, when the condition is "that if any of my kindred go from Baghdad he is to have nought," respect must be had to the condition, except that in this case if he return to Baghdad he would be restored to the benefits of the *wakf*.[1]

Among conditions that must be respected, Khassâf has mentioned a condition that the superintendent shall not let the lands, and if he does let them the lease shall be void. If the wâkif makes a condition that he shall not enter into an agreement for gardening or cultivation on the basis of division of produce, or provides that when the superintendent lets the land he shall be expelled from the office, in such cases if he should act contrary to the conditions he is to be expelled and the judge shall appoint another, whom he can trust to carry out the condition.

Section VI.

ALIENATION OF WAKF PROPERTY.

As a general rule, it may be stated that the private alienation, temporary or absolute, by mortgage or otherwise, of *wakf* lands, even though for the repair or other benefit of the endowment, is illegal according to Mahom-

[1] Alamgiri II, p. 504; Baillie, p. 600.

medan law. Accordingly, when once a property has been constituted *wakf*, all right of proprietorship ceases, and it cannot be alienated or transferred by sale or gift, nor is it subject to the rights of inheritance.[1] A valid settlement by way of *wakf* made *inter vivos*, that is, which is not dependent for its operation upon the death of the testator, cannot be revoked, nor is it affected by the subsequent misconduct or misdealing of either the settlor himself, or those responsible for carrying out his behests so as to render it alienable, or to destroy the character of inalienability impressed by the constitution of *wakf*.[2]

It must, however, be proved that the land is endowed; a mere nominal endowment will not prevent alienation.[3]

Grants to an individual in his own right for the purpose of supplying means of subsistence have been held not to be *wakf*.[4] It must, however, be remarked that the nature of the grant would be modified by the circumstances of the special case. Where the grant is not absolutely to the grantee, and it appears that it is meant to provide means of subsistence to his descendants, the Mahommedan law will regard it as a valid *wakf*. Again, where the grant is made to A. under the name of *wakf* and no mention is made of any further trust, it will nevertheless be effectual in creating a trust for the poor, after

[1] *Moulvee Abdoolla* v. *M. S. Rajesri Dossea*, 7 Sel. Rep., 268; S. D. A. 1846, p. 266: and see *M. S. Qadira* v. *Shah Kubeer-oo-deen Ahmud*, 3 Sel. Rep., 407; *Abul Hasan* v. *Haji Mohammad Masih Karbalai*, 5 Sel. Rep., 87; *Kulb Ali Hoosein* v. *Syf Ali*, 2 Sel. Rep., 139; *Moulvee Abdoolla* v. *Ramzoo Dye*, S. D. A., 1847, 192; *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen*, 2 Moo. I. A., 390, S. C., 6 W. R., 3. *Syud Asheeruddeen alias Kalla Meah* v. *Sreemutty Drobo Moyee*, 25 W. R, 557.

[2] *Doyal Chand Mullick* v. *Syud Karamat Ali*, 16 W. R. p. 116.

[3] *Juddo Nundan Burral* v. *Kalee Coomar Ghose*, S. D. A., 1852, p. 331. For the test of a nominal endowment, see the case of *Gunga Narain Sircar* v. *Brindabun Chunder Kur Chowdhry*, 3 W. R., p.. 142.

[4] *Bibee Kuneez Fatima* v. *Bibee Saheba Jan*, 8 W. R. p. 313.

LECTURE IX. A.'s decease; and A. will have no right of property over the subject of the grant.

But when a heritable estate is burdened with a trust, *viz.*, the keeping up of a saint's tomb, it may be alienated subject to the trust.[1] The first question in such cases is whether the estate is heritable. If there is an actual dedication as *wakf*, it is submitted it would not be heritable. If there is no express constitution of the estate as *wakf*, but a trust has been created expressly for the purpose of maintaining the saint's tomb, the legal effect would be the same. But if the property has been treated all along as heritable, in that case *only* the principle laid down in the case referred to can apply, and the property can be alienated subject to the trust.

The courts, however, in some cases, have clearly gone beyond the Mahommedan law in holding that the whole of the profits must be devoted to religious purposes in order to constitute a valid *wakf;* and the decision in

Futtoo Bibi v. Bharut Lall Bhukut.

Futtoo Bibi v. *Bhurrut Lall Bhukut* seems to be in direct conflict with the Mahommedan Law. The English doctrine against perpetuity is not recognised by that Law; and, accordingly, where a property is burdened with a trust which is ostensibly lasting in its character, such property is considered to be tied for that purpose, and consequently inalienable. It may, therefore, be submitted that the decisions in which such *wakfs* have been held to be inheritable are not in accord with the principles of the Mahommedan Law.

In the case of *Dalrymple* v. *Khoondkar Azeezal Islam*,[2] it was held that if an endowment be wholly *wakf*, a mutwalli is incapable of granting a lease extending beyond

[1] *Futtoo Bibi* v. *Bhurrut Lall Bhukut*, 10 W. R. 299.

[2] S. D. A. 1858, p. 586; see also *Shoojat Ali* v. *Zumeerooddeen*, 5 W. R. p. 158.

the period of his own life. If, however, the office is hereditary, and the mutwalli has a beneficial interest in the endowment, the property is looked upon as an heritable estate burdened with certain trusts, the proprietary right of which is vested in the mutwalli and his heirs, and he can exercise the right possessed by other proprietors, of granting leases even in perpetuity. It is difficult, however, to understand what is implied here by the term "wholly *wakf*." If it is intended that the dedication should be wholly for religious or pious purposes, the view is admittedly erroneous; for it has been already abundantly shown that private *wakfs* or settlements in favour of children and others, and even in favour of the wâkif, are lawful. In such cases also the mutwalli is a trustee on behalf of the beneficiaries. Can he then, with or without the consent of the beneficiaries, (or of other beneficiaries if he be one of them), grant a *mouroosi* lease? It is submitted, he cannot; for, by allowing him to do so, it would be injuring the reversionary interests of the succeeding beneficiaries.

In connection with this branch of the question it must be remembered that the mere charge of certain items which must in time cease on a *wakf* estate does not render the dedication invalid.[1] Nor does the mere stoppage of religious services start limitation against a *wakf*.

Lands belonging to a Mahommedan, which are occupied by tombs, cannot be sold in execution of a decree.[3] Nor can a *makbara* or burial-ground be alienated, for it is *wakf* from its nature.[4] A general dedication of land for the

[1] *Muzhoor-ul-Huq* v. *Puhraj Ditarey Mohaputtar*, 13 W. R. 235.

[2] *Doyal Chand Mullick* v. *Syud Karamat Ali*, 16 W. R. 116.

[3] S. D. A. Beng. Sum. Cases, p. 40, 21st Novr. 1842.

[4] 5th December 1846, S. D. A. N. W. P. p. 250.

LECTURE IX. purpose of a cemetery establishes *wakf*, and excepts the same from descent to the heirs.[1] But the existence of tombs on land, unless it is constituted into a *makbara*, does not prohibit partition, except as to the actual spot covered by the tombs.[2]

Where certain Inaam land, granted for the service of a masjid, was attached in satisfaction of a decree obtained by a mortgagee of the property against the descendants of the original grantee, who had mortgaged it to him, it was held that by the Mahommedan law the mortgage was illegal and void, as land appropriated to religious purposes could not be sold or mortgaged by any of the descendants of the original proprietor ; and the Court agreed that the attachment should be raised.

The mutwalli may, however, under special circumstances, pledge the *wakf* property, either wholly or partially, with the sanction of the Kazi, as previously stated, and may even alienate a portion of the property. But any such act done without the permission of the Kazi is wholly void and inoperative.

Moulvee Abdoollah v. Rajesri Dossea.

In the case of *Moulvee Abdoollah* v. *Rajesri Dossea and another*,[3] the plaintiff (who was the appellant in the Sudder Court) sued as the mutwalli of a mosque for the rents of certain lands attached thereto. The defendant Rajesri Dossea pleaded that one Mahomed Ufzul, the late superintendent, borrowed from her husband 51 rupees for the repairs of the mosque, and mortgaged to him the rents of the 8 cottahs and tank for three years, providing in the deed of mortgage, dated 9th Jeyt 1219, that the debt was to bear interest at 1 per cent. *per mensem* for those three years, and that at

[1] 5 S. D. A. Rep. (Beng.) p. 136, 30th July, 1831.

[2] Sel. Rep. 204, Bom. S. A. 1839.

[3] 7 Select Reports, p. 268.

the expiration of three years, if the debt were not paid off, the rent of the 8 cottahs, 5 sicca rupees *per annum*, should be sold to him for the debt, and the rent of the tank, or 1 rupee *per annum*, paid to the superintendent for the expenses of the mosque. She contended that as the debt had been incurred by Mohammed Ufzul for the repairs of the mosque, and the mortgage had not been cleared off, the engagement was binding on his successor, the present plaintiff. The first Court decreed the plaintiff's suit, but it was dismissed by the Lower Appellate Court on the ground that the mortgage was created for the benefit of the mosque by the late incumbent and was therefore valid. On appeal by the plaintiff, the Sudder Court held, in accordance with the *fatwa* of the Law Officers, that the alienation by mortgage of land devoted to religious purposes, and of the produce of such land, was invalid, and that the fact of the land being mortgaged for the repair or other benefit of the mosque, did not affect the case.

When the sale of *wakf* property is set aside on the ground that it was not alienable and "it has happened" that in the interval erections have been made by the purchaser, he would be entitled to remove those erections provided that they can be separated from the *wakf* property without injury to it. If they cannot be so removed, as in the case of trees planted by the purchaser, the Kazi may, in his discretion, direct a legitimate compensation, provided the erections distinctly add to the value of the *wakf* property. If the erections have been made by pulling down the original *wakf* building, or the trees are planted from grafts taken from *wakf* properties, the purchaser is not entitled to receive any compensation for them. He is only entitled to recover back from his vendor the value paid by him.

Lecture IX.

No alteration made in a *wakf* building by the purchaser or anybody else would change the character of the *wakf*. The purchaser would be liable for any loss occasioned to the *wakf* by his alteration or addition to the *wakf* building, and for restoring it to its original condition, but he will not be entitled to any compensation on account of any improvement, unless those improvements are distinctly separable.

The purchaser will not be entitled to remove any erection made by him, if from such erections an advantage accrues to the *wakf*. For example, a man makes a better oven for preparing bread in place of an old one, he cannot remove it, nor is he entitled to any compensation for it. But if he fixes lamps he can remove them, or if they are left, he is entitled to compensation.

The purchaser is entitled to recover the value of the building at the time when the sale is set aside and not the price paid by him. For example, if a man purchases a house for ten thousand dirhems and lives in it, and the house has become dilapidated he is not entitled, when the sale is set aside, to the price which he paid for it. If the value has increased, the purchaser would be entitled to receive the enhanced price.

Mode of disbursement when proof of custom wanting.

If there is no proof forthcoming as to who are entitled to the benefit of a *wakf*, or as to the mode of disbursement followed by the mutwallis of former times, the *wakf* should be applied for the benefit of the poor.

When a *wakf* is set aside on legal grounds, that is, on the ground of invalidity, the property reverts to the grantor or his heirs; and in their default goes to the public treasury (*bait-ul-mâl*). But as long as the *wakf* can be upheld, the property will not go to the *bait-ul-mâl*, but will be applied for the help of the poor and the needy[1]

[1] Compare the Shiah Law. According to English law there is no escheat

or for any charitable purpose by which benefit is likely to accrue to the public at large. LECTURE IX.

A public *wakf* created by the sovereign can never be set aside on the ground of invalidity or otherwise. For example, a dedication by the sovereign or *Ameers* for a mosque or a cemetery, a tank, a canal and such like objects, or for the support of men of learning, or students, cannot be set aside, though the administration of the *wakf* may from time to time be modified by the Kazi in accordance with the requirements of the time.

A person makes a *wakf* for the habitation of his *wife* in the *wakf* building, and then dies. The widow afterwards re-marries. She loses her right of habitation and even if the second husband divorces her, she does not recover the right.

When a house is dedicated for the habitation of certain individuals they cannot partition the dwelling among themselves. But when a dedication is made for the residence of the members of a certain family, only those who are *mahram* to each other may reside in it, unless the dwelling is divided into apartments or rooms with doors, where a female may live with her husband without being subjected to the intrusion of a *ghair-mahram* male living in the same house. For example, if a house is dedicated for the residence of a family consisting of two married sons and two married daughters, in order that the husbands of the married daughters may be able to live in the same house, there must be separate rooms set apart for the sons and daughters respectively.

of a trust in fee of lands upon failure of the *cestui qui trust* and of any person to claim the lands through the settlor; see *Burgess* v. *Wheate* Eden., p 176 ; *Taylor* v. *Haygarth*, 14 Sim., p. 16; *Cox* v. *Parker*, 22 Beav., 168. As for the meaning of the term *bait-ul-mâl*, see "Personal Law of the Mahommedans." In the proper sense of the term, there is no escheat, under the Mahommedan Law, of lands constituted *wakf*.

CHAPTER XII.

SECTION I.

THE SHIAH LAW RELATING TO WAKF.

LECTURE X.

How *wakf* may be constituted under the Shiah Law.

Wakf, according to the Shiah doctrines, is an act the effect of which is to tie up the *corpus* or substance of a thing, and to leave its usufruct free. According to the Jawâhir-ul-Kalâm, the object of *wakf* is the continuance in perpetuity of a benefaction in the service of the Deity. The express word by which it may be created is *wakafto, i. e.*, "I have dedicated;" but as already pointed out before, in relation to the Hanafi law, a *wakf* may be created by any other expression when the intention is apparent. The Jawâhir-ul-Kalâm states that there is nothing in law to debar the creation of a *wakf* by the use of any other expression besides *wakafto*. For example, a *wakf* may be created by the expression *haramto* ("I have consecrated") or *tussuduqto* "I have given in alms." But as absolute perpetuity is not a necessary incident of these expressions reference must be made to the intention of the donor. The meaning of this is, when the intention of the grantor is clearly to create a *wakf*, whatever expression he may have used, the dedication will take effect, but where the term *wakf* itself is used, the dedication will take effect as such without any question. If a person make use of an expression which does not in any degree, convey

the idea of *wakf* and yet acknowledge that he intends to make a *wakf* thereby, it will take effect as a *wakf*. If a man were to say, "I have consecrated this house for the poor and given it in perpetuity," it would be a *wakf*. If he were to say, "I have tied up this property and given it in the way of God," or "that I have tied up this property and given the profits in the way of God," it would be a *wakf*.

Phudia Bibi v. Mohammed Kazem Isphahani (unreported).

Where a trust is expressly created, the introduction of words of gift does not change the character of the *wakf*. This question was considered at some length in the case of *Phudia Bibi and others* v. *Haji Mohammed Kazem Isphahani and others* decided by Pigot, J., on the 31st of March 1884, upon the construction of the will of Nawab Sidi Nazir Ally Khan. By his will the Nawab had devised all his property to an executor, whose heirs the plaintiffs claimed to be, on certain trusts which were purely discretionary. The plaintiffs contended that the devise was an absolute gift to the executor, Meer Mohammed Kazem. The defendants contended that though the term *wakf* was not used in the document, which was in the English language and form, it was a valid *wakf*. The will was as follows:

"This is the Last Will and Testament of me Nawab Sidi Nazir Ally Khan of Ballygunge in the suburbs of the town of Calcutta, zemindar, whereas I am indebted to various persons in large sums of money such loans being secured to them by mortgages over my real Estate in Calcutta and in the Mofussil and my Promissory Notes and whereas being about to leave India I am desirous of making a Testamentary disposition of my property in the event of my decease, I give devise and bequeath all my real and personal Estate whatsoever and wheresoever of which I shall be seised and possessed at the time of my death unto Meer Mohammed Kazem Jowahery of Chitpore Road in Calcutta upon Trust at his discretion and at his absolute authority and as and when he or any other of the Trustee or Trustees for the time being of this my will shall think fit to sell and dispose of collect and get in and convert in money all and singular my said real and personal Estate or any or such portion thereof

LECTURE X. as he the said M. M. Kazim or any other Trustee or Trustees for the time being of this my will shall in his or their discretion think fit or advisable and upon further Trust by with and out of the moneys to arise from such sales and collection to pay satisfy and discharge all my just debts and funeral and Testamentary expences and upon further Trust to lay out and expend such portion of the surplus of the said monies as the said Trustee for the time being of this my will shall think fit in the construction or building of a mosque Imambara or Mahommedan religious institution to be called by my name for the performance and observance of religious ceremonies and festivals and acts of piety and charity inculcated in and enjoined by the Mahommedan religion the nature character and extent of which shall be in the entire and absolute discretion of the Trustee of this my Will for the time being and upon further trust to lay out and invest the Residue of the said monies after payment of the cost of the construction of the said Mosque Imambara or other Mahommedan religious Institution as aforesaid in or upon Securities of the Government of India or in or upon the purchase of real property in Bengal and I direct that the said Trustee or other the Trustee or Trustees for the time being of this my Will shall hold the interest rents and profits of the said Securities or real property in which the said monies may from time to time be invested upon trust to apply the same in and towards the repairs maintenance and preservation of such parts of the said real estate as shall not have been sold as well as of the real estate in which the said Trust monies may be invested and the payment of all rents Revenues Taxes and other outgoings and expences incidental thereto and upon Trust to apply the surplus or balance of such interest rents and profits and also the rents and income arising from such parts of my said estate as may not be sold as follows that is to say as to such portion thereof as the said Trustee or other the Trustees for the time being of this my Will shall in his or their judgment and discretion think fit in and towards the performance and observance of religious ceremonies and festivals and acts of piety and charity inculcated in and enjoined by the Mahomedan religion the nature character and extent of which shall be entirely in the judgment and discretion of my said Trustee or other the Trustee or Trustees for the time being of this my Will and as to the balance or residue thereof to and for the absolute use and benefit of the said Trustee or other the Trustee or Trustees for the time being of this my Will and I give and bequeath the same unto him or them his or their executors administrators or assigns accordingly.

* * * * * * * * * *

Provided Also and I further declare that it shall be lawful for the said Trustee or Trustees for the time being of this my Will at any time or from time to time in the discretion of the said Trustee or Trustees to sell or dispose of any stocks—funds—securities or lands wherein any of the Trust moneys for the time being shall or may happen to be invested and to invest the money to arise from such sale in any other stocks or funds or

other Government securities or in purchase of real estates in Bengal and way or transfer the same as occasion shall require or shall be thought fit. Provided also and I hereby declare that in case the said Meer Mohammed Kazem shall die in my lifetime or shall renounce the execution of the Trusts hereby created or in case the said Meer Mahommed Kazem or any Trustee or Trustees to be appointed under this present provision shall die or shall be absent from Bengal for the space of six consecutive calendar months at one time or shall otherwise become unwilling or unable to act in the aforesaid Trusts then and so often as the same shall happen it shall be lawful for the said Meer Mohammed Kazem or other the Trustee for the timebeing or if there be no Trustee then for the Executors or administrators of the last deceased Trustee to nominate any fit person or persons to supply the place of the Trustee so dying residing abroad or becoming unwilling or unable to act as aforesaid and that immediately after every such appointment the said trust estates monies and effects stocks funds or securities shall be conveyed or transferred in such manner that the same may vest in such new Trustee and such new Trustee shall have and be capable of exercising all the powers and authorities whatever hereinbefore containing in the same manner to all intents and purposes as if he or they had been appointed a Trustee or Trustees by this my Will * * * * * *

The learned judge with reference to the principal contention, held as follows :—

" Now, it is contended that by this document Nazir Ally gave his estate to Meer Mohammed Kazem subject to trusts merely colorable and not intended to be carried out. The question is, whether this contention is a valid one. The principal case relied on by Mr. Phillips was *Morice* v. *The Bishop of Durham.*[1] Now, in this case it appears to me the question is not whether a good trust was created, but the plaintiff's case will not succeed, unless it is shown by her that Meer Mohammed Kazem was not intended to take as a trustee. If he was intended to take as a trustee, he would not take any beneficial interest. The deed declares that Meer Mohammed Kazem takes as a trustee. It lies upon the plaintiff to show that he was to take absolutely. There can be no doubt that

[1] 10 Ves. p. 510.

LECTURE X. there was a trust regarding some portion, in the building of the mosque, &c. So far therefore he took as a trustee. But as regards the unconsumed income, it has been contended that Meer Mohammed Kazem took absolutely. The will, however, says that he was to take it as a trustee. If it had said that the office of mutwalli was hereditary, a step might be gained in favour of the plaintiff's contention. But it is not so here. It cannot be said that the beneficial interest was given to the heirs of Meer Mohammed Kazem, when each trustee has the power of appointing another person as trustee. Then I am to regard the various clauses in the will regarding the appointment and responsibilities of the trustees. I might, perhaps, if I were not deciding the question judicially, have said that Nazir Ally probably intended that the property should, or expected that it would, descend to his friend's descendants, each of them successivly, exercising his power of appointment in favour of his heir, or some of his heirs. But I cannot import this conjecture into my judgment for the purpose of construing the plain terms of the will. Then it was argued that the mere beneficial enjoyment of the unexpended income indicates a strong intention to create a beneficial interest and did in fact create such an interest. Without examining the cases in detail, it is sufficient to say that the cases cited by Mr. Kennedy and Mr. Ameer Ali, notably those of *d. d. Jaun Bibi* v. *Abdoollah Barber* and *Advocate General* v. *Fatima Bibi* show that no surmise can be founded upon the fact that the residue or balance of the income was to be enjoyed by the Trustee. That being so, I think the contention of the plaintiff must fail, and the issue raised whether the estate of Nazir Ally formed part of the estate of Meer Mohammed Kazem must be determined in the negative."

The Sharâya defines a *wakf* in the following terms :—

"*Wakf* is a contract, the fruit or effect of which is to tie up the original of a thing, and to leave its usufruct free. The only express word by which it can be constituted is '*wakafto*,' 'I have appropriated;' for with regard to '*hurrumto*,' 'I have consecrated,' and '*suddukto*,' 'I have bestowed,' they are not sufficient to constitute *wakf* without accompanying circumstances, as by themselves they are susceptible of another interpretation besides *wakf*. If, however, they are used with the design of constituting *wakf*, they are obligatory on the conscience of the person employing them without any circumstances to fix their meaning. And if he should actually acknowledge that he used them with that design, judgment should be given against him in terms of his acknowledgment. It has been said, indeed, that if he should say, '*Hubbusto o Subbulto*,' *wakf* would be constituted even without any circumstances to point this meaning, because He, on whom be peace, has said, '*Habbis ul asl wa subbil-ul sumrat*' (tie up the original and give away the fruit). Others, however, have maintained that there would be no *wakf* in these cases without corroborative circumstances, as the words by themselves would not commonly be so understood; and this is the more approved opinion."

Definition of *wakf* according to the Sharâya-ul-Islam.

"And the delivery of possession is a necessary condition for the validity of the *wakf*." But this principle also should be taken subject to the conditions pointed out in dealing with the Hanafi law, that is, actual change of possession is not necessary, constructive transfer being sufficient. For example, it is lawful for the wâkif to constitute himself mutwalli. In such a case a formal change of possession is out of the question. And, therefore, what is intended by the principle is not actual delivery of possession to another, but change in the charac-

Possession necessary; subject to qualifications.

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LECTURE X. ter of the possession or of the dominion exercised over it. It is in this sense that the Mafâtîh declares that if the wâkif continue to exercise his right over it and make no change in the character of the possession, the *wakf* will not take effect. Where a dedication is for a public purpose, no (express) delivery of possession is necessary, for the user of it by any individual is sufficient to constitute a valid *wakf*.

According to the Jawâhir, delivery of possession is not necessary also where the *wakf* is in fact a *sadkah*, a charitable grant. Similarly in the case of a musjid or any *maslihat* or object of utility. In these cases the mere non-delivery of possession will not avoid the *wakf*. But where the donees or beneficiaries are capable of taking possession of the subject of dedication, or there is some person who can take possession in their behalf and this is not done, the *wakf* is inoperative.

When all the conditions requisite for the completion of a *wakf* are complied with, it becomes absolute (if made in health) and cannot be revoked according to "our" doctrines. "On this point," says the author of the Jawâhir-ul-Kalâm, "Abû Hanifa differs from us, though his disciple Abû Yusuf on arriving at Bagdad dissented therefrom. If the subject of the *wakf* has once changed possession and ceased to be under his dominion or has come into the hands or under the control of the beneficiaries or the trustee on their behalf, the wâkif cannot revoke it or change the conditions of the *wakf* or withdraw it from the way of God or the purposes to which it is dedicated."

Wakf made in death-illness.

All this relates to a *wakf* made in health. But if a *wakf* be constituted at a time when the wâkif is suffering from a *death-illness*, it will take effect with reference to the entirety of the dedication, provided the heirs consent,

otherwise the *wakf* will operate only in respect of one-third of the estate of the testator. "For *wakf* is like other acts which take effect immediately such as *hiba*, sale and similar obligations." If the *wakf* property is covered by one-third of the estate, then it is valid as regards the entirety of the dedication. If not each provision will be given effect to with regard to its priority until one-third of the estate is exhausted.

"If a person," says the Sharâya, "should, in death-illness, make a *wakf*, gift and *muhâbât* sale and emancipate a slave, and the acts be not allowed by his heirs, then they would be valid if they can be carried into effect out of a third of his estate; otherwise they are to be preferred according to priority of date, and effect is to be given to each in order until the third of the estate is exhausted, after which any that may remain is void."[1]

There is this difference between immediate dispositions of property, *i. e.*, dispositions *inter vivos* and bequests, that in the former case the one-third takes effect in respect of the existing property, whereas in the case of bequests, consideration has to be paid to the condition of the estate after the decease of the testator. If there happen to be many bequests in a *wakf*, and it is difficult to determine which provision should take priority, *i. e.*, when all the provisions are of the same degree of importance, in that case, according to the Shaikh[2] all the provisions should be given effect to and the one-third respecting which the *wakf* is operative should be applied to the effectuation of all the objects. "When a person," says the Sharâya, "has bequeathed property for the performance of certain duties, some of which were incumbent on the testator and others

[1] Sharâya-ul-Islam, p. 234.

[2] Mafâtih after the *Mubsoot;* Shaikh Murtaza is meant here, see Introd., p. 31.

LECTURE X.

only discretionary, they are all to be carried into effect if a third of his estate be sufficient for the purpose. If the third should not suffice and the heirs refuse their consent, those duties that were incumbent on the testator must first be discharged out of the general mass of his estate, and then the others out of a third of what remains beginning with the first mentioned by the testator, and so on in order. If none of the duties are of the incumbent description but all discretionary, they take effect only to the extent of a third of the estate and are to be discharged beginning with the first mentioned by the testator, and so on in order until the third is exhausted."[1]

SECTION II.

CONDITIONS RELATING TO THE SUBJECT OF WAKF.

The subject of *wakf*.

These are four; (1), the subject of the *wakf* must be a substance; (2), it must be the property of the appropriator, (3) capable of profit whilst it exists and (4) capable of being delivered. Hence it has been said that when anything is not existing in substance, the *wakf* thereof is not valid; for example, the *wakf* of a debt payable to a person is not valid.[2] In the same way the *wakf* of a thing in substance is invalid if it is not particularly specified; for example, if a person were to say "I have appropriated a house or mansion," it would not be valid unless he specifies which house he means. The Sharâya says, "the *wakf* of *akâr* or lands and houses, of clothes, furniture and lawful instruments is valid; the rule being

[1] Sharâya-ul-Islam, p. 248.

[2] This must, however, be taken subject to qualifications discussed afterwards, see *seq.*

that the *wakf* of anything from the use of which benefit can be lawfully derived, consistent with the preservation of the thing itself, is valid; thus the *wakf* of a trained dog and cat is valid, from the possibility of benefit being derived from them."[1] The Mafâtih says "the *wakf* of a *dayn* or of a thing indeterminate is not valid by reason of there being no certainty or identity of the same." With reference to this latter point, as well as the legality of the *wakf* of profits or of dinars and dirhems, in other words money, the question is involved in considerable difficulty. The Jawâhir-ul-Kalâm[2] has discussed the subject at some length, the result of which appears to be that whilst some of the patristic lawyers of the Shiah school, like the author of the Sharâya and the Mafâtih are inclined to hold against the validity of such *wakf;* the Shaikh and most of those jurists, whose views are in accordance with the progress of the times, declare that the *wakf* of profits and of monies, when they can be permanently applied in trade or commerce, so that a permanent benefit may be derived from the same, is valid, as will be seen from the remarks which have already been made in respect of the Hanafi law. This view is in accord with

[1] "The *wakf* of food and such like things is not valid because they are consumed in their use. The *wakf* of violets, or flowers in general, and lamps (*kandîl*), mats, &c., are valid according to custom and times." This shows how elastic the rule is, and that one must not go by the letter of the law but by its spirit.

[2] "And whether the *wakf* of *dinars* and *dirhems* is valid or not, the opinion of some is that it is not, and this seems to me to be more approved for it is in accord with the ancients (*mutakaddamin*). And in the *Mabsut* it is said that there is general agreement about it, with the exception of those who held it valid, who are few. The reason is that *dinars* and *dirhems* are expended and no further use can be derived from them, and this is against the principle that a *wakf* must always be subsisting and its profit should be applied for the relief of the poor and other good acts, but when the profit of a thing is always subsisting, as in the case of a honey-comb, it is valid," Jawâhir-ul-Kalâm.

LECTURE X. the altered conditions of society. The principle, upon which the more ancient lawyers of the Shiah school have proceeded, in holding that the *wakf* of money and *munáfa* is invalid, is that such subjects either possess no stability or permanence, or that they are expended in their application for the purposes for which they are dedicated. But when money is applied in trade, or where profit is derived from investments, the objection which seemed to them to possess so much force, loses all weight, and it is on this ground that modern Shiah lawyers have upheld the validity of such *wakfs*.[1] But if the subject of the *wakf* is not distinctly specified, but is capable of being ascertained by enquiry, such *wakf* would be valid. For example, if a man who is possessed of two houses were to say that he dedicated one of his houses " either this one or that one, " it would be valid.

It is a condition that the property appropriated should be the wâkif's ; otherwise the *wakf* is not valid. If the appropriation, however, is made of a property belonging to another, the *wakf* will be validated by the ratification of the real owner.

The *wakf* of a *mushaá* or an undivided share in a thing is valid, and possession of it is to be taken in the same way as in the case of a sale.[2]

Conditions relating to the wâkif or appropriator.

It is a condition that the wâkif should be *bâligh* (adult) ; that he should be possessed of complete understanding, and be possessed of the capacity to deal with his property, that is, be subject to no inhibition on the ground of incapacity. The author of the Jawâhir is inclined to think, and rightly, that the latter condition depends on the former, and in the Sharab-i-Luma the only condition rerequired is sound understanding.

The creation of a *wakf* is like the performance of a

[1] Jâma-ush-Shattât. [2] Jawâhir-ul-Kalâm.

devotion, and therefore as there is no obligation on a lunatic and an infant who has not attained puberty to perform any devotion, their *wakf* too would not be valid, for the understanding necessary to the comprehension of its nature and effect is wanting. But there is some difference of opinion regarding the question what would be the effect of a *wakf* when made by a boy who has attained puberty at an early age, say ten years. Presumably his act would not be valid, for the law does not presume discretion until the completion of the 15th year.

The wâkif can lawfully retain the superintendence of the *wakf* in his own hands or appoint another; but no condition which would enable the wâkif to revoke or cancel the trust is valid or lawful. Nor can he reserve to himself the power of resuming the mutwalliship whenever he likes after already appointing one in the office.[1] As it is required that the nazir or superintendent should be a man of honesty and should know how to perform his duty, if the wâkif is incompetent or dishonest, that is, neglects the trust or misdeals with it, he may be removed or another man may be associated with him.[2] When the wâkif has appointed no one for the superintendence of the the *wakf*, the duty would devolve on the *cestui qui trustent* when the *wakf* is for specific persons who can appoint a trustee on their behalf, and on the *Hâkim-i-Shara* (judge), when it is for a public purpose, or in the way of God, or for a continuing and variable class of people.

Concerning the *moukoof-alaih* there are four requisites:—

[1] This view seems opposed to the view taken in *Hedâitunnissa's* case, 2 N. W. P. Reports, p. 410.

[2] This subject has been fully dealt with in dealing with the Hanafi law. There is no difference between the Hanafi and the Shiah law on this point.

LECTURE X.

Conditions relating to the *Moukoof-alaihim* or the *cestui qui-trustent.*

(1) He must be existent.

(2) Must be capable of owning property.

(3) Must be *muyyin* or specified.

(4) Must be one in whose favour it is not unlawful to make a *wakf.*

As a corollary to the above principles, the Sharâya lays down the following doctrine: "Consequently if one should make a settlement beginning with a person not in existence—as for instance, one to be born, or a fœtus not yet separated from the womb of its mother—the *wakf* would not be *sahih* (valid). But if it were in favour of one not in existence in succession to a person actually in being, it would be *sahih.*" The comment of the Jawâhir on this passage is interesting, and brings into prominence the views of the Shaikh on this subject;—"If one makes a *wakf* for a non-existent person at the commencement it will not be *sahih ;* for example, a person makes a *wakf* for his child about to be born, or the fœtus which is not separated from the womb, though (in one aspect it is *moujood* or existent, and bequests in its favour are lawful and it is entitled to a share, upon the partition of the inheritance, yet a *wakf* is not valid in its favour," probably on the ground that it is not capable of holding possession of the property but where a *wakf* is in favour of a non-existent object in succession to an existing object which is capable of acquiring its benefit, such *wakf* is valid.

When a person makes a *wakf* commencing with a non-existent object, and then in favour of existing objects, it is not *sahih,* but whether it will annul or render the entire *akd-i-wakf* (the contract of *wakf*) *bâtil* or void is a question which has been answered in two ways; some jurists, among them the author of the Sharâya being of opinion that it is void, whilst others including the Shaikh hold

that it will be valid in favour of the existing objects and invalid as regards the non-existing. For example, a *wakf* in favour of an unborn child and after it for the existing children will take effect at once in favour of the latter, the invalidity of the *wakf* in respect of the former object which is non-existing, only accelerating its operation in favour of those that are in existence. According to the Jawâhir-ul-Kalâm the great jurist Yehya ibn Muyyid holds the same view which is apparently conformable to the opinions entertained by a large body of the *ullâma* (the learned).

A *wakf* for *masâlih* valid.

A *wakf* for *masâlih* or works of general utility or for pious and charitable purposes, in the benefit of which all human beings may participate, is valid. For example, a *wakf* for (constructing or maintaining) bridges and musjids, providing shrouds for the dead, and like purposes is a settlement on all mankind, though a limited number may participate at a time in its advantages;[1] and though no specific individuals may be mentioned as the people for whose benefit such *wakf* is created, it would be valid because all God's creatures can derive benefit therefrom. Consequently a *wakf*, the object of which is to confer a general benefit on the public, for example, a *wakf* to a Madrassa, or the *wakf* of books to a library and such like is valid.

A *wakf* in favour of a *harbi* invalid.

A Moslem cannot make a *wakf* in favour of an *alien enemy*, though he may be a blood-relation, but he can make it in favour of a non-Moslem subject (*zimmi*) of the same sovereign, whether he be a stranger or in no way related to him, for it is the conferring of kindness or charity on a human being, who may be induced to take the right way. The validity of a *wakf* to a *zimmi* is maintained on the ground that a *sadkah* or alms may be validly given

[1] Sharâya, p. 245; Mafâtih; Jawâhir.

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to him. But it does not follow from this that a Moslem can make a *wakf* in favour of a church, a synagogue or any place of non-Moslem worship, for that would be assisting in the propagation of infidelity, which is unlawful and forbidden to Moslems. But a *zimmi* can make a *wakf* on a non-Moslem place of worship. A Moslem can make a *wakf* for the benefit of *zimmis* for purposes which are lawful under the Mahommedan law, such as the repair of their houses, erection of hospitals, or places of refuge, &c.[1]

A *wakf* for sinful purposes invalid.

A *wakf* in favour of fornicators, highway robbers or drinkers of wine is not valid, nor for the copying of what are now called Tourât and Injîl (the Pentateuch and the Christian Gospels) since they are altered and perverted variations. But if such appropriations were made by an infidel, it would be lawful. No *wakf* which is productive of sin is valid.

If a Moslem were to make a *wakf* in favour of the poor, it would be applied primarily to the benefit of the Mussulman poor, and if there happen to be none then to other poor; but a *wakf* by a non-Moslem in favour of the poor generally would be applied for the benefit of the poor of his neighbourhood without distinction of creed.

A *wakf* in favour of Moslems generally.

When a *wakf* is made in favour of Moslems generally, all people who are subject to the laws of Islam, their women and their children, will be included; the use of the expression Moslem excludes those who are not subject to Islam. A *wakf* in favour of *Momins* (those who have the *Imân* or true faith[2]) will be applied only for the benefit of the followers of the twelve Imams.[3]

[1] Sharâya, pp. 235 and 236; Mafâtih.

[2] "Faith has two meanings—(1) general and (2) special; generally it means, to accept from the heart those laws which the blessed Prophet has brought; the special meaning resolves itself into two heads:—(*a*) to act piously and (*b*) to believe in the *Imamat* of the Imams."

[3] See the Personal Law of the Mahommedans, pp. 15, 16.

A *wakf* in favour of *momins* generally will be applied to such purposes as would be beneficent to them. LECTURE X.

If the *wakf* is for Shiahs then according to our present usage it will be applied for the benefit of *Imamias*.[1] The Shiahs include the *Jarudiyahs;* the *Ismailyas* are included in the *Zaidyas*.

Whenever the *Moukoof-alaihi* (*i. e.*, the person in whose favour a *wakf* is made) is described by a particular relationship, all those who come within it are held to be included in the benefits of the *wakf*.

So that if the *wakf* is in favour of the *Imamias*, it is for all the followers of the Imams. In like manner when it is for the *Zaidyas*, all those who assert the Imamship of Zaid, the son of Ali (the second), are included. Likewise, when the connection is a relation to a particular ancestor, all those lineally descended from him by their fathers are included. As for instance, "Hàshimis," who comprehend all those descended from Hàshim through Abû Tâlib, Harith, Abbas and Abû Lahab; or "Tâlibis" who are descendants of Abû Tâlib, on whom be peace, both males and females participate if connected with him on the side of their fathers from a regard to custom, though upon this point there is some difference of opinion.

If one should make an appropriation for the Bani Tamîm, it would be valid and should be applied to any of them who can be found.

Wakf in favour of neighbours.

If a person should make an appropriation for (his) neighbours (*jiran*), a reference should be made to custom for determining who are to be thereby comprehended.

Some say, however, that any one whose house is within forty cubits is a neighbour, and this opinion is good or well supported, while others maintain that the meaning

[1] "Shiah means a person who propagates the Imamat of Ali, may the peace of God rest with him."

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of the term extends to all the occupants of forty houses on either side, but this opinion is now abandoned.

A *wakf* in favour of a *maslahat* that has ceased to exist how to be applied.

If one should make a *wakf* for a *maslahat* or object of general utility but that has ceased to be used, it will, according to the approved doctrine, be applied to any good or pious purpose. It will, however, be better to apply the same with reference to the true intentions of the appropriator. So the *wakf* for a musjid will (in case of the intended musjid not being in existence) be applied to another musjid, and that for a Madrassa to another like Madrassa, and so on, regard being had to the same description of object as was intended by the appropriator.[1]

When a *wakf* is made for a good purpose in general it will be applied to any good purpose by which an approach is made to Almighty God.[2]

So also in the *Shara-i-Luma* :—" If one makes an appropriation in the way of God, then it will be applied to every purpose by which an approach is made to God, because from the way is meant the path of God, that is the path of reward [in future life] and the reward and pleasure of God; this will include, therefore, helping the needy, building mosques and repairing roads, supplying shrouds to the dead, whatever brings blessings ; some say it includes holy warfare, others that it includes *Hajj* and *Umrah* (lesser pilgrimage). But the first view is correct.[3] In the same way if one makes an appropriation in the way of charity or in the way of *sawáb* (reward), it means the same thing, and the meaning will not be split into three parts. Some (jurists) have said that ' the way of rewards' means the poor and indigent and commencement should be made with his poor relations, and from the ' way of charity ' is meant the poor and indigent, and travellers, and debtors who have become indebted in pious

[1] Mafâtih. [2] Ibid. [3] Sharh-i-Luma.

acts and the ransoming of slaves, but the intention of the appropriator should be regarded.[1]" LECTURE X.

If one makes an appropriation for charity generally, without any specification of the purposes, it will be applied (or expended) on the poor and all purposes by which an approach (to God) might be made, like conferring benefit on students, building mosques and schools and bridges and *Mushâhid*, the assistance of pilgrims, supplying shrouds for the dead, and it is allowable to spend for the general benefit of Mussulmans.[2]

In the Jawâhir this principle is stated thus:—"If a person constitute a *wakf* for a *maslahat* such as a musjid, a bridge or some object of a similar character and all traces of its use and effect have totally vanished, (*lit.* have become totally effaced or annulled), in such a case the income of the *wakf* property would be expended on good purposes generally. Preference, however, would be given to an object approaching in character as nearly as possible to the object of the original dedication." It will be seen from this that the *cyprès* doctrine is carried much further under the Shiah law than even under the Hanafi law. And this will appear more clearly from the following dictum. "If a person were to make a dedication generally for charitable purposes,[3] then without any difference of opinion, the *wakf* property will be applied for the benefit of the poor and indigent and for all pious acts and objects which may be the means of approaching the Deity; *birr* or charity is a word which comprehends all good and pious actions (*khair,*) such as the help of the poor, the assistance of the weak, the improvement of the condition of the Mussulmans, the performance of *Hajj*, Jehad, &c."

With the exception of Ibn Junaid, most of the writers

[1] Comp. the Jawâhir. [2] Ryâz-ul-Ahkâm.

[3] مسالك البر و الاحسان

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Ibn Junaid's views.

are agreed in holding that a dedication, when the object is not mentioned either expressly or impliedly, is void. Ibn Junaid, however, holds that when a person declares a property a *sadkah* in the way of God (which is another way of saying it is a *wakf)*, though he may not mention the people for whom the *sadkah* is constituted, yet it would be applied to the benefit of those whom God has declared to be the recipients of the *sadkah* or legal alms, *i. e.*, the poor and the indigent, the needy and helpless. Virtually the views of Ibn Junaid are not opposed to those of the other jurists, for they also hold that in the absence of any express mention of the special object, where the *wakf* is clearly for pious and charitable purposes, it will be applied to such purposes as are for the good of Mussulmans generally.[1]

A *wakf* for an indeterminate object invalid.

If the *wakf* is created for an indeterminate object it is invalid, *e. g.*, if it is for one of two mosques or for one of two Imambaras, it is void.

A *wakf* in favour of relations generally.

If a person make a *wakf* for his children or his brethren or his relations generally, the males and females, the nearer and the more remote will share equally[2] unless the order in which they should participate is specified, or it is expressly stated that it is for the males, when the shares will be distributed in accordance with the rule laid down. Where a *wakf* is for paternal and maternal uncles together, they share equally. A *wakf* for those nearest to the wâkif will be primarily applied to his parents and descendants, then to his brothers and sisters and their descendants together with the ascendants, and lastly, and on failure of these, to paternal and maternal uncles and their descendants.

[4] Jawâhir-ul-Kalâm. [5] Jâma-ush-Shattât.

Section III.

THE CONDITIONS UPON WHICH DEPENDS THE LEGALITY OF A WAKF.

There are four essential requisites on which depends the legality of a *wakf*.

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Essentials requisite to the legality of a *wakf*.

(1) That it must be perpetual.

(2) That operation must be given to it *in præsenti* or the time fixed for its coming into operation should be quite certain and positive.[1]

(3) That possession must be given of the thing appropriated, or, more properly, the property should cease to be the property of the donor.

(4) That the right of the donor should be entirely divested therefrom.[2]

With reference to the first condition, the view generally adopted is, that in order that a *wakf* may take effect in *perpetuity* it must be for an object or objects, which, individually or collectively, would presumably last always. A *wakf* for *masálih* or works of general utility or for pious and charitable purposes generally, for any particular *maslahat* which is for the benefit of all mankind is lasting in its character, for it is for the benefit of humanity at large. A charitable purpose is also perpetual in its nature for there are always poor in existence. In fact any continuing object of *birr* and *ihsan* is sufficient for a perpetual *wakf*; for example, a *wakf* to supply water or *sherbut* to the congregation in the mosques or imambaras, to provide shrouds, to light the lamps in a place of worship, to keep up the library of a Madrassa, to wage a

[1] Without difference of opinion *wakf* should be made at once; it cannot be made to depend on the occurrence of an event (in future) unless the same be quite certain and positive; Sharáya.

[2] *Haji Kalb Hossein* v. *M. S. Mehrun Bibi*, 4 N. W. P., 155.

LECTURE X. sacred war, to support the poor Syuds of Kerbulla, to keep the acqueduct there in repair or any sacred place and such like. But when the dedication is for Zaid and nothing is said as to how it should be applied after Zaid's death, and there is nothing from which the intention of the donor can be inferred as to the future application of the proceeds of the *wakf*, in that case the *wakf* will operate only during his lifetime and on his death will, according to the generally received doctrine, revert to the wâkif or his heirs, as the case may be. According to another school of jurists, the remainder will be for charitable purposes in general.[1] The same will be the case where the *wakf* is for Zaid and his descendants.

If a property is made *wakf* or *hubs* for two persons one of whom dies, the survivor will enjoy the benefit of the property during his lifetime. Another view is, that the moiety of the deceased will revert to the donor. But "the former seems more approved."

A *wakf* for the donor's son for one year or for his lifetime and the remainder for the poor is valid (as a perpetual *wakf*) by general consensus.

[1] Jawâhir-ul-Kalâon.

[2] So if it (the appropriation) is restricted to a particular time or made dependent on some quality of future occurrence the *wakf* is void. Such also is the case when it is made in favour of persons who will probably fail. As for instance if one should made a settlement on Zaid with a restriction to himself or extend it to generations that would probably fail, or if he say generally for his successors without mentioning what is to be done after they fail—in these cases it is maintained by some that the *wakf* would be entirely void, but others insist that due course should be given to the purposes actually named and this is approved. Then upon their failure the property would revert to the heirs of the wâkif or appropriator, but some of the doctors maintain that it reverts to the heirs of the *Moukoof alaihi* or the person in whose favour the *wakf* is made. The first opinion, however, is the most approved.

If one should say, I have appropriated when the beginning of the month should come, or if Zaid will arrive, the appropriation would not be valid.

If a person were to constitute a *wakf* for his sons in the following manner, that is to say, for one year for Amr, the next year for Zaid and so on, and after them for the poor, in the following manner—for their learned one year, for their pious in the second year, and their *mashâikh* in the third year, such a *wakf* is valid and will be given effect to.

A contingent gift is invalid; for example, if a man were to say "this is *wakf* when Zaid comes or when the first of the month comes."

SECTION IV.

DIVESTMENT OF THE WAKIF'S INTEREST.

Seisin under the Shiah Law.

"Seisin is a condition for the validity of the *wakf*," says the Sharâya, "so that if the wákif should die or become insane before he has completed the *wakf*, it will be invalid." The nature of the seisin will depend on the nature of the subject of the *wakf*, and the objects for which it is dedicated. If the dedication is for specific individuals who are competent to take possession of the *wakf*, seisin is essential. But where the *wakf* is for pious purposes or the benefit of mankind in general, no seisin is necessary.

The Sharâya states the principle thus:—Where a *wakf* is made for the poor or for the learned in law a superintendent (*kyyim*) must be appointed to take possession of the *wakf* property—while in the case of a *wakf* made for a *maslahat* or useful purpose, the creation of the trust implies that change of possession which the law requires, the condition of acceptance being entirely dispensed with, and as to possession that of the nazir or superintendent is sufficient. If a person should appropriate a musjid or place of worship, the appropria-

LECTURE X. tion is valid though only one person should pray therein. In like manner, if a person appropriate a cemetery, the same becomes valid, by the interment therein even of a single corpse. But though people should pray in a musjid or bury in a cemetery without the formal words of *wakf* being pronounced, neither would pass out of the property of the owner. Such also would be the result if possession was not given of the *wakf* property though the appropriate words were used. In other words a change in the character of the possession is necessary.

The possession of the mutwalli appointed to look after the *wakf* would be sufficient and the wâkif may be mutwalli himself.[1] Similarly where the *wakf* is for the wâkif's minor children, if the wâkif remains in possession, the *wakf* nevertheless is valid. His possession would be on their behalf;[2] so also in the case of a grandfather. Similarly, with regard to the father's and grandfather's executor.

A *wakf* in favour of one's self not valid under the Shiah Law.

With reference to the fourth condition, it will be observed that there is a marked difference between the Shiah and Sunni law on the subject. According to Abû Yusuf, a wâkif is entitled to reserve for himself an interest in the *wakf* property, or as he puts it "to eat thereout." Under the Shiah Law, in order that a *wakf* may be valid, it is necessary that there should be no reservation of interest in favour of the wâkif. "If a person were to make a *wakf* for himself," says the Jawâhir, "it would not be valid; this is without any difference of opinion. Similarly, a *wakf* commencing with the wâkif, *e. g.*, for the wâkif and then for another, will be invalid, though some, among them the Shaikh, have held that it would be invalid only as regards himself. The former opinion seems to be generally adopted." "Similarly, if the *wakf* were made

[1] Jâma-ush-Shattât. [2] According to Mohammed Ibn Muslim.

in favour of another with a condition for the payment of the wákif's debts and current expenses, it would not be valid. This is supported by the answer of Abu'l Hassan (may the blessing of God rest on him) to the letter of Ali ben Sulaimân who wrote to the Imam thus :—'May I be your sacrifice ; I have no children, and I have some lands which I have received from my father, I intend to dedicate the same for my poor and weak brethren ; if I make a *wakf* in my lifetime, can I eat therefrom whilst I live?' To this the reply was, 'I have received thy letter and learnt its purport, if thou shouldst make a *wakf* of thy lands and make a condition to eat therefrom, it will not be valid. If thou hast heirs, sell the lands and give a portion (of the proceeds) to the poor, or reserve a portion which may be sufficient for thy support during thy lifetime and dedicate the remainder.'"

The following from the Jâma-ush-Shattât throws considerable light on this subject.

Q. When a person makes a *wakf* of some property in this way, *viz.*, "I have constituted this a *wakf* in perpetuity, and its *towliut* I have reserved for myself during my lifetime, and after my death for the eldest and fittest of my children in succession, generation after generation, (*batnan baad batn*) and have appointed that the rents and profits of the *wakf* property after paying all royal taxes and costs of collection, I shall apply for my expenses; and after my death, one-tenth of the said rents and profits, after deducting the taxes and costs should be given to the mutwalli for his remuneration and the remainder divided among my children equally, but the share of my daughters shall not go to their children; and some time after the wâkif died leaving three sons and the sons of predeceased sons, will his grandsons take any interest in the *wakf*, &c.?

A. This *wakf* is void *ab initio*, for the wâkif reserved to

LECTURE X. himself during his lifetime the profits of the property. It is one of the conditions for the legality of a *wakf* that the wâkif should take out the subject of the *wakf* from himself. Therefore when a *wakf* is made on his own *nafs* (self) it is *bâtil*, though there are others mentioned after himself as the beneficiaries thereof. With reference to the voidableness of the *wakf* as to himself there is consensus; as regards the voidableness of the remainder, the general opinion is that it is so, for the arguments in support of the validity of the *wakf* in favour of the others are weak. Similarly, if he makes a *wakf* and stipulates to defray his every-day expenses or to pay his debts thereout, it would be invalid. But a condition that his people and children and family should eat out of the *wakf* would be valid, as is apparent from what was done by the Prophet and his daughter (may the blessings of God rest on them both), and in this respect there is no difference between those who are entitled to maintenance and those who are not. In the same way, it is lawful to fix the allowances of mutwallis and nazirs or to give them permission to eat out of the *wakf* and supply others with food. In the *Masâlik* it is clearly laid down that when the wâkif is himself mutwalli, it is lawful for him to eat out of the *wakf* (as a mutwalli) and this "eating" does not fall within the category of a provision for the wâkif's own benefit. The author of the Kifâyeh, however, doubts whether the wâkif can "eat out" of the *wakf* in this way. It must be admitted that considerable difficulties surround this point, and on this account many people question the lawfulness of the wâkif taking any share even as mutwalli. For example, a person makes a *wakf* of some property on his children and conditions that the *towliut* should remain in his hands during his lifetime, and after his death it should go to the fittest among

them, and the wâkif also conditions that nine-tenths of the profits of the *wakf* should belong to him by right of *towliut* and the remaining tenth should be given to the children, and that after his death one-twentieth should be given to the fittest of the children by right of *towliut*, and the balance of the income be divided among them equally,—in such a case as this my view is that the *wakf* would not be valid. Admittedly it is lawful for the wâkif to retain the *towliut* in his own hands during his lifetime and also to condition that the mutwalli should feed himself and others from out of the *wakf*. From these two theses some of our jurists have drawn the conclusion that where the wâkif has made a condition for the mutwalli for the time being to feed himself and others out of the *wakf* and the wâkif happens to be the mutwalli, it is lawful for him to eat thereout, though a few have doubted the lawfulness of his doing so. The result is, that the legality of the mutwalli eating out of the *wakf* depends on his quality as mutwalli, and not upon the wâkif being the mutwalli. And the jurists are agreed that where anything has been fixed for the mutwallis generally, it is lawful for the wâkif, when he happens to be the mutwalli, to take so much as is fixed for the other mutwallis; but I have nowhere seen that it has been held that a wâkif whilst he is a mutwalli can lawfully take for himself anything he likes out of the *wakf* simply because he himself is the mutwalli. The meaning of this is, that the retention of such a general power which would authorize his taking the largest share for himself, leaving almost nothing for the beneficiaries, is contradictory to the condition which requires a complete divestment of all proprietary right on the part of the wâkif. This of course does not apply to those cases when a person has made a *wakf* for the indigent and has himself become poor, or where he has made *wakf* for the learned and has him-

But the wâkif when mutwalli can lawfully take the allowance reserved for the trustees generally.

LECTURE X. self become learned. In such cases, the wâkif would be entitled to participate in the benefits of the *wakf*, and it makes no difference whether at the time of the *wakf* he is a fakîr and learned, and whether he becomes so afterwards. But if he makes a condition that he as a fakîr should participate in it, it would not be valid. The result is that where a *wakf* is made for a general purpose (*jihat-i-âmma*), a wâkif may lawfully participate in it." From the above passage, it is clear that the wâkif can lawfully take the allowance fixed for the mutwallis generally when he himself holds the office.

There is another case given in the Jâma-ush-Shattât which deserves equal attention with the above as explaining the question how far a grantor may reserve to himself any interest in the *wakf* property.

Q. One Zaid makes a *wakf* of six dams of a certain property and six dams of a certain mill and executes a wakfnamah which is attested by one of the mujtahids of the time who is dead. The purport of the wakfnamah is as follows :—out of the *wakf* four dams should be for the benefit of the wâkif's male children, generation after generation; should there be no male children then for the female children in perpetuity. Two dams to be devoted to the following purposes, *viz.*, for the expense of the sacred months of Rajab, Shaban, and Ramzân, in such a way that the good resulting from such disbursements may be for the soul of the wâkif, and during the first two months they should entertain fifteen Koran-readers, each of whom should read four parts of the Koran; and after the death of the wâkif, should offer prayers and fastings for the soul of the wâkif, and that during his lifetime the wâkif should be mutwalli thereof, and after his death his eldest son should be the mutwalli, and so on; that during his lifetime he should take $\frac{10}{20}$ of the proceeds by virtue of

the office of *towliat* and $\frac{1}{20}$ should be given to the children, that after his death $\frac{1}{20}$ should be given to the mutwalli, and the rest distributed among his children. Is such a *wakf* valid? LECTURE X.

A. "This question cannot be answered without its being discussed in three aspects—

If the document, the purport of which has been given above, forms the only evidence of the conditions of this *wakf*, then it must be pronounced to be wanting in legality on several grounds; (*a*) with reference to the dedication of the two dams, it would appear that it does not come into operation until after the death of the wâkif, for the directions given as to the mode of application of the proceeds thereof take effect only as a testamentary provision upon his death, since the wàkif declares that the income thereof should be applied in entertaining Koran-readers, feeding the poor, performing prayers, etc., upon his death for the benefit of his soul. But it is a condition for the legality of a *wakf* that it should have operation immediately. In the present case, the *wakf* of the two dams is dependent upon the death of the testator, in fact there is no one entitled to the benefit of that portion unless it be presumed that it is the wâkif himself, which would be invalid. And if it were said that the proceeds of the two daneks should be applied to charity in general until the death of the wâkif, and after his death should be applied to the Koran-reading &c., mentioned by him, this is clearly opposed to the purport of the wakfnamah itself. The *wakf* therefore is clearly invalid as it is a *wakf* virtually in one's own favour?"

Similarly, if one were to make a *wakf* and condition therein that out of the income thereof his debts should be paid, such a *wakf* would be invalid. But when a person conveys his property in trust to sell the property and out

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of the proceeds to pay his debts and to invest the remainder for religious or pious purposes or in erecting a religious building and maintaining religious observances therein, it would be a valid dedication.

A *wakf* in favour of one's self and the poor.

If a person were to make a settlement on himself and the poor, half the property would be validly dedicated and with reference to the remaining half the *wakf* would not take effect. In the case of *Hajee Kalb Hossein* v. *Musst. Mehrun Bibi*,[1] the Allahabad High Court enforced this principle. The decision in this case is so important that it may be usefully set out here in *extenso*.

Haji Kalb Hossein v. *Musst. Mehrun Bibi.*

In the year 1851 one Mussamut Sahibzadee executed a deed by which she appropriated certain monies and estates of which she was possessed to certain religious and other purposes in the following manner, *viz.*, she appropriated two-thirds of the income to herself during her lifetime for her necessary expenses, and the remaining one-third of the income she declared divisible into fifty-five shares, of which some were to be distributed to certain persons therein mentioned, charged with religious duties, and the residue to be expended on religious ceremonies, which were specified. She appointed herself trustee, and declared that the fifty-five shares as detailed would remain appropriated during her trusteeship, and that neither she nor her assignee nor representative should have power to transfer the property so appropriated; and she declared further that after her trusteeship, the trustee who might succeed to her should, after discharging Government revenue and other outgoings and charges of management, divide the balance of the income into 165 shares, and retain 55 shares on account of his trusteeship, and apply the remaining shares as therein directed to the pay-

[1] 4 N. W. P. H. C. Reports, p. 155.

ment of pensions to persons therein mentioned, for the performance of religious duties, and to certain specified religious purposes. By this deed one share out of the 55 shares in the income of the property was to be paid to the plaintiff, who was the respondent in the High Court, during the lifetime of the settlor, and 10 shares out of the 165 shares into which the income was to be divided on the expiry of the settlor's trusteeship were to be paid to her, and after her death, to her heirs, "generation after generation," subject to the condition that they performed certain religious duties therein particularized.

The settlor died in 1872, and the respondent, having failed in obtaining payment of the shares appropriated to her by the deed of 1851, instituted a suit, to recover her allowance thereunder. The Lower Courts decreed the plaintiff's claim. In special appeal it was contended *inter alia* that the respondent ought, prior to the institution of the suit, to have obtained sanction of the Court under section 18, Act XX of 1863. With reference to this objection the High Court held as follows:—"that section only prescribes the necessity for obtaining sanction when suits are instituted under that Act. This suit is not instituted under that Act: the respondent has instituted this suit to recover a direct pecuniary interest created in her favour by the deed of 1851. The Act, while it empowered persons to sue, whose right to sue independently of the Act may be doubtful, did not deprive persons in the position of the respondent of the right to sue, which they have independently of the Act, nor did it impose on them the necessity of obtaining sanction of the Court for the institution of this suit. Moreover, the Act refers to foundations to which, at the time the Act was passed, the provisions of Regulation XIX of 1810 were applicable; and it appears to us that

LECTURE X. to the trust created by the deed of 1851 the provisions of that Regulation were not applicable. The management of the trust estate had never been assumed by the Government officers, nor was the nomination of the trustee at the time the Act was passed vested in the Government or a public officer, nor was the nomination of the trustee subject to the confirmation of Government or any public officer. The nomination of a trustee may hereafter in certain events become vested in a public officer, but these events have not yet happened. We therefore overrule this objection."

Their Lordships then proceeded to deal with the principal objection in the following terms:—"It is contended that the deed of 1851 was not a valid deed of *wakf* according to the tenets of the Imamea sect, first, because Shahibzadee Begum remained in possession of the property as proprietor up to the date of the gift in 1867, and secondly, because she reserved to herself a benefit out of the *wakf* property, in that she reserved two-thirds of the income for the necessary expenses during her lifetime. To constitute a valid *wakf* according to the doctrine of the Shiahs, it must be absolute and unconditional, and possession must be given of the *moukoof*, or thing appropriated, and it must be taken entirely out of the wâkif, or proprietor himself. Firstly, then we have to consider whether possession was given of the appropriated property. The law allows the appropriator to appoint himself mutwalli, consequently inasmuch as the settlor appointed herself mutwalli, and by her conduct subsequent to the execution of the deed of 1851 indicated that she held the appropriated property in the trust declared in that deed, we hold there was sufficient proof of possession to satisfy the requirements of the law; but we also hold that as to two-thirds of the property, the deed

of 1851 did not create a valid *wakf*. The settlor reserved to herself the benefit of the income of two-thirds of the appropriated property, so much of the property she settled on herself for her lifetime, and consequently this case is not distinguishable from the cases mentioned in the Sharaya. It remains to be determined whether the invalidity of the deed of 1851, as a wakfnamah, in respect of the two-thirds, renders it altogether invalid, or invalid only to the extent of the two-thirds. The Sharaya declares that where a settlement is made on another with a condition for the payment of the wâkif's debts, or necessary expenses, such a settlement is invalid. In that case the reservation is of an indefinite benefit; in the present case one-third of the income, a definite share, was, as it appears to us, absolutely and permanently appropriated to purposes other than the temporal benefit of the settlor; and entirely taken out of the settlor, and inasmuch as the *wakf* of a *mooshoa*, or undivided share in a thing is valid, we feel ourselves at liberty to hold that the deed of 1851 was valid to the extent of one-third of the income of the property; and that that share of the property is available for the satisfaction of the trust declared by the settlor to take effect after her trusteeship. Consequently the claim of the respondent must be reduced by two-thirds."

Though it is not lawful for a wâkif to create a *wakf* in his favour, yet if the *wakf* is in the way of God "or for a pious or religious purpose, for example, a musjid, it would be lawful for the wâkif to derive benefit therefrom, *viz.*, to participate in the prayers held there and to offer his prayers in the place. Similarly, in the case of a *wakf* of a public character; such as a bridge or hostel (*musafir-khâneh*)." In considering the validity of a *wakf* which is not of a public nature, and in the benefit of

LECTURE X. which the wâkif participates to a certain extent by implication, the important question to determine is, whether the wâkif intentionally made a reservation in his favour of that interest. Apparently, the participation of the wâkif to a small extent which does not show that the *wakf* was a mere device for tying up the property for the wâkif's own benefit would not be invalid. This view is submitted as the result of the difficult and somewhat casuistical arguments discussed in the Jawâhir.

If a person create a *wakf* and make a condition that the property should return to him in case of necessity, the condition will be valid and the *wakf* will be void, the settlement taking effect as a *hubs;* when the need arises the property will revert to the owner. The need must be such as is considered valid under custom and usage but not anything technically called a need. When the property once reverts to the donor the right of alienation will attach to it.

A condition to the effect that the wâkif should have the power of excluding any one he liked from the benefit of the *wâkf* is invalid. But a condition to introduce fresh beneficiaries is valid, excepting in the case of a *wakf* in favour of children.

When a *wakf* is for one's children generally, children born after the *wakf* will be included, though there may not be any express condition to that effect. But when a *wakf* is made for children of any property which is made over to them, after-born children will not be included unless it has been so expressly provided.

When a settlement is made for the benefit of one's infant children, the donor will not have the power of so varying the terms of the *wakf* as to include outsiders in

its benefit unless he has expressly reserved power to that effect.[1] Lecture X.

Possession.

The seisin which is required is of the first donee or *moukoof alaihi* and all regard to possession ceases in the subsequent steps. It is not necessary, however, that there should be any actual transfer of possession; what is required is a change in the character of possession. For a wâkif may make a *wakf* and remain in possession as trustee for the beneficiaries of the trust; such retention of possession would not affect the legal character of the settlement.

As the provision requiring seisin on the part of the first *cestui qui trust* relates to a change in the character of the possession, constructive delivery of possession is sufficient. As already pointed out, when dealing with the Hanafi law, when the possession is already in the hands of the *cestui qui trust* or trustee no formal delivery of seisin is necessary. The former possession is sufficient to create a valid *wakf*. For example, if A. dedicates a property which is in his possession through an agent B., and appoints B. as the mutwalli or trustee thereof, no further delivery of possession is necessary, the relation of B. as agent ceases with the creation of the *wakf* and the property remains in his hands as trustee.

The passage in the Sharâya, therefore, that "the seisin which is required is of the first *moukoof alaihi*" must be read with due regard to the other circumstances. Nor is the seisin of the donee or donees themselves necessary. Any one who is actually or constructively their agent may take possession of it. Where a *wakf* is made for a charitable or pious purpose of a public character, as in the case of an appropriation for the poor, for lawyers, for students and such like, it is out of the question for

[1] Sharâya-ul-Islam.

LECTURE X. the entire body of beneficiaries to obtain seisin of the property; the possession of the Hâkim, who is the public curator, or of the superintendent appointed by the wâkif or by the Hâkim for that purpose, would be sufficient.

The wâkif can validly appoint himself or another person as the mutwalli of the *wakf*. In the case of a *wakf* in favour of an object of public utility *(maslahat)* such as a bridge, a mosque and such like, acceptance is not a condition nor seisin of any specific person deriving benefit from such *maslahat*.

The seisin of a mutwalli or superintendent, curator or *nazir* appointed for the purpose of managing or looking after the maintenance of the *wakf* is sufficient. When the wâkif has constituted a mutwalli or curator no reference is necessary to the Hâkim. In case of any question as to the validity of his appointment, the Hâkim, as the guardian of the interests of the Mussulman public, will appoint a nazir.

When a *wakf* is made for a *musjid, i. e.*, when a place or building is dedicated for prayers, it will be valid if prayers have been offered there even by one man. Similarly, a cemetery would become dedicated by the burial of one corpse. It must, however, be borne in mind that the intention of the appropriator must be apparent. For example, the permission of the owner of a house to another person to pray therein, or even the continuous offering of prayers in a private house, will not convert the residence tnto a *musjid* or place of worship. But if a person declares that he dedicates his house as a mosque and after that allows another person to pray therein, that would be sufficient to create a valid *wakf*.[1] Again, if a person were to erect a building of the usual customary type of a mosque, and allow another to offer his prayers therein, it would be sufficient, though there may be no express declaration constituting it a *wakf*. Mere interment of a corpse on

[1] See *ante* pp. 237, 238 where this question is fully discussed.

a land, or offering of prayers in a building without express or implied declaration of intention on the part of the grantor, will not be sufficient to constitute the land or building a valid *wakf*.

If a father or grandfather make a *wakf* of a certain property belonging to him for his child or grandchild, and retain possession of it on behalf of such child though a mutwalli has been appointed, such possession is lawful, and will be regarded in law as the possession of the *cestui qui trust*.

The beneficial interest in such properties as are dedicated for charitable or pious purposes appertains to God. For there is no *mâl* without a *mâlik*, and inasmuch as there is no specific beneficial owner of such public trust, the property impliedly belongs to the Deity.

Wakf on children.

Where a *wakf* is made on one's children's children, (*awlâd-i-awlâd*), the children of daughters will participate with those of the sons.

Where a *wakf* is made for one's children and their children, the descendants of the third generation will not be included, unless it can be gathered that the donor intended all his descendants to share in the benefit of the *wakf*.

When a *wakf* is made for one's *awlâd* and *awlâd of awlâd* and their *awlâd*, all the surviving descendants share equally *per capita*, unless it is laid down that they would take *batn after batn*, when the *batns* will take in succession.

When a *wakf* is made for children generally, it will enure to the benefit of all the descendants of the wâkif; and upon their extinction alone the benefit of the *wakf* will accrue to the poor.

When a *wakf* is made for a *musjid* which becomes ruined, and the village or *mahallah* in which it is situated becomes deserted, yet the *wakf* will not cease, and the *wakf* property

will not revert to the wâkif notwithstanding that, barring the traces of the building, nothing else remains from the musjid. This doctrine is accepted "among us" without a difference.

When a building becomes ruined so that there are no traces left of it, the land on which it was situated will not go out (of the category) of *wakf* and it cannot be sold. The ruin of the building will not destroy the *wakf*, the characteristic of which is perpetuity.

When it appears that the sale of a *wakf* property will be to the advantage of the *wakf* or of the beneficiaries by investing the sale proceeds in some other more profitable property, the mutwalli may validly sell the property. When disputes have arisen among the beneficiaries, and it has become apparent that by keeping the property in its original form considerable injury will accrue to the *wakf*, sale is allowed. The wâkif is authorised to make a proviso to the effect that the mutwalli shall have the power to sell the property and invest the proceeds to better advantage.

When a *wakf* is made for the poor it will be applied to the poor of the city and such of those as are forthcoming to avail themselves of its benefit. The mutwalli has not to search for them and distribute the proceeds among them. Imam Abû Jâfer II declared in answer to an enquiry by Abû Ali ibn Suliman that when a land has been dedicated to the poor descendants of so and so, it will be applied to the benefit of such of them as are living in the city where the *wakf* is situated, or such as come forward to claim it and the mutwalli is not bound to go in search of them.

A sadkah cannot be revoked.

A sadkah cannot be revoked after possession has been once given, for it is equivalent to a hiba-bil-ewaz. The object of a sadkah is to obtain the favour of God and when it is made the favour is obtained, so it cannot be revoked.

CHAPTER XIII.

Section I.

THE MÂLIKI LAW RELATING TO WAKFS.

In his introduction to the chapter dealing with the Mâliki Law of *wakfs*, M. Sautayra makes the following observations :—" The institution of *wakf* dates from the time of the Prophet. Bukhâri reports in his traditions that Omar Ibn al-Khattâb having become the proprietor of an estate at Khaibar, came one day to the Prophet and told him he thought that estate a precious possession and asked what he should do with it to please the Almighty and deserve His grace? 'Make a *wakf* of it,' said the Prophet, 'and distribute the revenue thereof among the poor.' Omar carried this into effect and the estate made *wakf* could not be sold, given away, mortgaged, nor taken as heritage." Lecture XI.

" Originally a *wakf* was a donation in favour of charity by an act of piety involving the immediate relinquishment of the property in favour of the charity to which it was devoted, but the desire to increase the number of these grants induced the successors of the Prophet and the heads of the orthodox schools to authorize the founders to designate intermediate beneficiaries according to their own wishes. After this, it is intelligible that the principle of *wakf*, while retaining its pristine character, would become

Lecture XI. the means for a Mussulman proprietor to prevent his property from following the regular line of succession and to take away all rights from his wife, his mother, daughters and sisters and to maintain what he possessed in the male line.[1] All *wakfs* however do not cause disherision of daughters and wives; there are some on the contrary that sanction equal distribution without distinction of sex and others more numerous in which the devolution is directed to take place as ordained by the Koran. In this latter case the *wakf* has but one aim that of imprinting upon the constituted property a religious character, thereby protecting them from confiscation or the covetousness of the sovereign.[2] Concerning the law relating to *wakfs*, the two schools, the Màliki and Hanafi, followed in Algeria have both common and separate rules. The Mussulmans to whichever sect they belong may adopt the rules of either but they cannot submit their constitution to the prescriptions of both united."[3]

The wâkif's capacity.

All those who have the right to make a gift may also make a *wakf*. The settlor consequently must be :—

1. Free and not a slave.
2. Sane.
3. In good health, or to be more exact, he must not be suffering from a death-illness. A *wakf* by a sick person is similar to a legacy. It is null when made in favour of an heir, and reducible to a third if made in favour of a person, who has not the right of inheritance."

[1] According to the Hanafi Law; according to the Mâlikis a wâkif can not create a *wakf* in favour of his descendants so as to exclude his daughters.

[2] Comp. Mr. Harrington's remarks in the case of *Wasik Ali Khan* v. *Government*, 6 Sel. R. p. 110.

[3] 2 Sautayra, p. 374. The following principles are taken in the main from this work.

"A *wakf* made in favour of heirs," says Khalîl ibn Ishâk, "by a person during the illness of which he dies is null and void; but a *wakf* made in favour of descendants of the direct line [who are not heirs] is valid if it does not exceed the third of the inheritance."

4. Possessor of the property made *wakf*, that is to say, he must have dominion over it.

The Courts of justice have consequently annulled the *wakf*, (*a*), when the donor died heavily involved in debt and the property endowed had to be sold to discharge his debts; (*b*), when the debts of the settlor exceeded his assets; (*c*), when the grantor was not in proprietary possession of the property when he made the *wakf*.

5. *Sui juris*, having the full exercise of his rights. A married woman therefore cannot make a *wakf* of more than one-third of her property without the consent of her husband.

A non-Moslem who fulfils the conditions above mentioned can make a *wakf* of the whole or part of his property. The law makes but one exception to the liberality of those who do not follow the Islamic faith, it forbids their constituting a mosque as beneficiary of their *wakf*. "It is unlawful for an unbeliever" says the text "to make a *wakf* in favour of a mosque."

The beneficiary.

A *wakf* can be constituted in favour of every person who can possess property; it can also be made in favour of unborn children and non-existing objects. Accordingly the settlor can designate as beneficiaries :—

(*a*) A Mussalman or a non-Moslem provided the latter inhabits a subjected country; this is the result of the expression "tributary" used by the jurists and of the rule worded thus :—"A *wakf* in favour of a non-Moslem living in a hostile country is invalid."

(*b*) Men and women.

(*c*) Majors and minors.

(*d*) Heirs or non-heirs.

(*e*) Strangers.

(*f*) Works of beneficence, and charity, for example, a cemetery, a caravanserai, the tomb of a saint, the sacred cities of Mecca and Medina.[1]

The settlor's powers.

(*g*) The poor, the sick, the maimed &c.

The settlor has, therefore, the right to point out the beneficiaries, to take them either from his family or without. But is the right absolute? Does it go so far as to enable the wákif to exclude the constituents' daughters? The words of Khalil ibn Ishâk on this point are precise—"a *wakf* in favour of sons to the exclusion of daughters is illegal;" and this rule has constantly been enforced by the Courts of Justice in Algeria. "Whereas," says a decree made on the 30th December 1864 by the Court of Algiers, "the Koran is the foundation of the religious dogmas and of the civil law of the Mussulmans; and whereas its precepts determine specially the order and manner of succession in families (Sura IX;) and whereas the distribution of property such as it is ordained gives to the children of the female sex a quotient of the inheritance of which the female line shall not be deprived in favour of the male descendants unless the wish of the legislator be misunderstood; consequently a *wakf* so constituted would be tainted by a radical illegality as made in disregard to the commandments of the Prophet, the *wakf* in question must therefore be annulled."

"Considering," says another decree of the 3rd November 1868, "that the *wakf* was made according to the Maliki school; that according to this school female children cannot be excluded from the benefits of a *wakf*, the deed

[1] Comp. the provisions of the Hanafi Law, *ante* p. 225 and Agnew on Trusts, pp. 349-353.

is null and void."[1] "As for sons" according to Sidi Khalîl, "the grantor may validly exclude them from the *wakf.*" "The inverse (the exclusion of sons)," says Perron, "is legal but the Courts do not feel justified in acting upon the authorities upon whose opinion this view is based and have extended the principle laid down by Sidi Khalîl so as to place the sons on the same footing as daughters and have declared that neither should be excluded from receiving the benefits of the *wakf.*" One of the decrees of the Algerian Court of the 20th March 1865 says:—"that in virtue of a verse in chap. IV of the Koran, the son has the right to a determinate share in the paternal heritage and cannot be excluded therefrom directly or indirectly, that a *wakf* made by the father in favour of his daughter excluding the son should be regarded as being in reality but a disguised donation having for its object the contradiction of the Mussalman law, that from these reasons such *wakf* must be set aside."[2]

In any case exclusion is only forbidden as regards children of the first degree. Sidi Khalîl pronounces only those *wakfs* illegal that are made in favour of sons to the exclusion of daughters. Consequently the Courts have sanctioned the exclusion of—

(*a.*) A grandson.
(*b.*) The female issue of daughters.
(*c.*) All the issue of daughters.
(*d.*) The daughters of sons.

The grantor may designate not only the first beneficiaries of the *wakf* but also the successive ones in the order in which each should come. He, therefore, has the power

[1] According to the Hanafi Law, it is sinful but not illegal.

[2] These decisions are founded exclusively on the Màliki doctrines and have no application to the Hanafis.

LECTURE XI.

of giving a special right of succession different from that appointed in the *Shara* (the law).

Rules relating to the devolution of family *wakfs*.

The wâkif may declare 1*stly*, that the right of representation should be admitted; 2*ndly*, that devolution should take place *per capita*; 3*rdly*, that the division should be made among the beneficiaries according to sex. But if the deed constituting the *wakf* contains no clause on these different points the following rules will be observed :—

As regards representation there is no difficulty; representation does not exist in Mahommedan law, there is, therefore, no reason to apply it in matters appertaining to *wakfs* any more than in matters of succession.

Regarding the second point, that is a devolution *per capita*, an explanation is necessary. With reference to the devolution in the first degree, that is, children of the grantor it must necessarily go *per capita*. If, on the other hand, the question is of devolution in the second degree or a degree further off, it takes place *per stirpes*, following the rule laid down by the jurist Ibn Rushd and carried out by al-Lakhim, al Hattab and others. The son inherits from his father and is not excluded by his uncles, because every child succeeds and continues the branch of his father.

The Algerian Courts have given effect to this doctrine repeatedly. One of the decrees, that of the 20th April 1874, was pronounced under the following circumstances :— a *wakf* had, by a series of successive devolutions, fallen to two brothers Mohammed and al-Hadj Ali. Mohammed died in 1869, leaving seven children and the Kazi of Algiers decided upon the difficulties that arose about the possession of the *wakf* property by a judgment of the 20th October 1873 (confirmed on the 20th April following), that the children of Mohammed should divide among

themselves as representing one branch the half of their father's share, and that al-Hadj Ali as the head of another branch should hold the other half of the *wakf*.

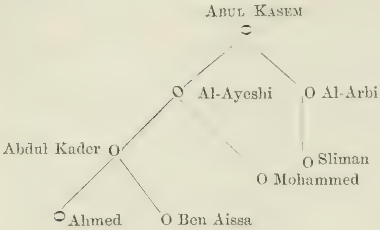
The third point relating to distribution among the beneficiaries is expounded in clear terms by Khalîl ibn Ishâk, "If the grantor has not fixed the proportions, men and women would have equal shares."

The founder can stipulate further that the privilege of a double line should be maintained, but in default of an express clause the consanguine share equally with the relations of the full blood. "The full brother and consanguine brother," says the Shaikh al-Hattab, "have equal rights, as their relation in respect to the father is equal in degree and in legal force." "If the founder," says Sidi Khalîl, "has stipulated that the portion devolving upon such an one should fall to his nearest relative, and if this person has full brothers, consanguine and uterine, which of these would have the right to the benefit of the *wakf;* would the full brothers be preferred to the other brothers? No; because they are all equally distant; there are the same number of degrees between them all." The commentator Abdul Bâki lays down the same doctrine. "By the words 'the nearest relative,' it is understood that the full brother and the consanguine brother have equal rights, as their relationship to their father is equal."

The lower line in the same branch, *i. e.*, which is a degree further off, participates with the upper line, that which is nearer, where it is provided by the terms of the *wakf;* if not, it is excluded by the superior line.

In order better to understand this rule we subjoin the following genealogical table—

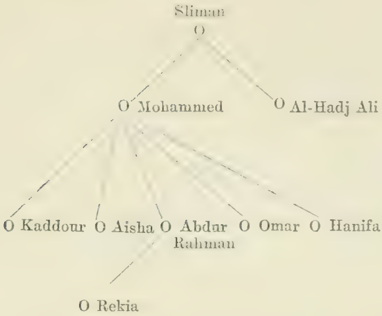
Lecture XI.



Abul Kasem, the founder of the *wakf*, had two sons al-Arbi and al-Ayeshi who became entitled in equal moieties to the produce thereof. Upon al-Arbi's death, the profits of the *wakf* were divided into two shares, *viz.*, al-Ayeshi retained his half and Sliman succeeded to the half of his father's share. Al-Ayeshi had two sons, Abdul-Kader and Mohammed. Abdul Kader died in the lifetime of his father leaving him surviving Ahmed and Aissa.

Q. Who should take the half of the *wakf* which had devolved upon al Ayeshi? *A.* If the wakfnamah does not contain any special condition, Mohammed would take exclusively, because Ahmed and Ban Aissa, his nephews, are a degree more distant than he, and because they do not represent their predeceased father. Had the wâkif made a provision to the effect that all the degrees should take equally, the inferior together with the superior, Ahmed, ben Aissa and Mohammed would have become jointly entitled to the share of al-Ayeshi and would have each taken one-sixth share of the produce of the *wakf*. This is in accordance with a decision of the Court of Algiers passed on the 25th May 1874.

Take another case :



Sliman makes a *wakf* in favour of all his children without distinction of sex; in default of descendants, in favour of his brothers Mohammed and al-Hadj Ali and their issue, similarly without distinction of sex. Sliman died without issue and the *wakf* consequently devolved on his two brothers. Mohammed died leaving five children; they divided equally among themselves, the half of that which their father had held. Abdur Rahman then died, leaving his only daughter Rekia, who takes the whole of her father's share contrary to that which happens upon ordinary succession. Then al-Hadj Ali dies without issue.

Q. Upon whom would devolve *his* half of the *wakf*?

A. Kaddur, Aisha, Omar and Hanifa each take one-quarter. As for Rekia, she is not entitled to a share in Ali's portion, as she is a degree more remote from him than her uncles and aunts, and representation not being stipulated for, she cannot claim the rights of her father predeceased. This is the solution given by the Court of Algiers on the 20th April, 1874.

Where one of the beneficiaries dies without issue, his

LECTURE XI. share devolves, as in the last example, upon his nearest relatives. Sometimes the founder declares this formally. "The one of the two who dies first shall transmit his share to the other." But more often the deed is silent on this point, and the Courts interpret this silence as though the clause above quoted were inserted. Thus a man named Ahmed ben Abd-el-Kader made a *wakf* in favour of his children; one of these dying without issue, his portion was allotted to his four brothers and sisters each taking a fourth share in accordance with the decision of the *Majlis* of Médéa of the 3rd September, 1858. Thus again, a *wakf* was held by several beneficiaries; one of these dying, a contest arose among the survivors and the Court of Algiers, by a decree of the 12th September 1867, decided that his share should be divided into equal portions among those who were of the same degree of relationship with him. This decision has since been sanctioned by a judgment of the Kazi of the 15th circle on the 10th September and by a decree of the Court of the 25th July, 1871. Such a solution admits of no difficulty when the beneficiaries are all descended in a direct or a collateral line from the founder of the *wakf* because they are all united by ties of relationship, and are all heirs of one another; but what should be the principle for decision in those cases where the beneficiaries nominated by the founder do not belong to the same family and one of them dies without issue? Would his share fall to his co-beneficiaries? If the deed contains a clause like the one we have quoted in the wakfnamah of 1804, or any other stipulation from which one might surmise that it was the founder's wish to leave the *wakf* to the survivor, the question would be answered in the affirmative; this is clearly deducible from the principle laid down by Khalil ibn Ishak. "A *wakf* granted to ten people for enjoyment

during their lives reverts, after all are deceased, to the grantor or in his default to his heirs."

In the absence, however, of any condition to that effect in the wakfnamah, the co-beneficiary has no claim, and the deceased's share would fall to the succeeding beneficiary or would revert to the donor if the succession is not indicated, as exemplified in the following passage in the text:—"when a *wakf* is made in favour of two particular persons, and after them in favour of the poor, these would be placed after the decease of one of the two in possession of his share."

Section II.

WHAT MAY BE CONSTITUTED WAKF.

The subject of *wakf*.

Khalîl ibn Ishâk has laid down, that all property over which dominion can be lawfully exercised may legitimately be constituted into *wakf*. And the jurists have gone so far as to declare that the benefit accruing from draught-cattle or horses, and the services of slaves to nurse the sick, may lawfully be dedicated. Whether simple aliment can be made *wakf* depends on the answer to the general question whether moveable property can be lawfully dedicated. And it must be admitted that there is considerable divergence among the jurists on this point. But it seems generally agreed, however, that moveable property can be made *wakf* as well as immoveable property, and Perron has declared that this is in accordance with the spirit of the Mâliki school. A decree of the Court of Algiers has confirmed the above principle. Khalîl ibn Ishâk has declared that the *wakf* of a book for a library or a war-horse or a suit of armour is lawful. But in consideration of the primary object of a *wakf* and

LECTURE XI. of the fact that when an appropriation is made, the intention of the wâkif is to reserve the property for pious acts, the usufruct being only given to the beneficiaries, the lawyers have held that those things which are liable to be destroyed by use or likely to perish in the course of time, could not be constituted into *wakf*.

But a *wakf* may be made of every kind of moveable object, when they are to be sold and the price realized therefrom is to be invested in the acquisition of immoveable property. Agricultural implements, yoke-oxen and other animals kept on land for agricultural purposes may be made *wakf* without any question.

A fractional share of a particular property may lawfully be dedicated. And when a house has been made *wakf*, and a portion of it has been sold to pay his debts, the remaining portion will continue subject to the dedication. It is not necessary that the grantor should be in actual possession at the time of making the *wakf*. The law authorises the dedication of future property. This principle has been confirmed by a decree of the Kazi of Algiers made in 1873 and again 1874. The latter is worded thus: "A dedication in the name of the Almighty constituting as *wakf* the whole of which a man is possessed, and that which may accrue to him in the future is lawful, but it will take effect with reference to such properties of which the beneficiary obtained full possession before the death of the grantor."

Formalities relative to the creating of a *wakf*.

"A *wakf* is made," says Sidi Khalîl "by the use of the following expressions: 'I make a *wakf*,' or 'I give in alms;' but these formula must be emphasized by indicating the object of the dedication."

In spite of its importance the constitution of a *wakf* is not subject to any solemnity nor publicity. It is validly made by a declaration before witnesses. But the validity

of a *wakf* is subject to two essential conditions, namely, (1) that it should bear the character of a pious act; (2) that there should be a transfer of the subject-matter of the *wakf*, and the proprietory rights of the appropiator should be divested therefrom. The first of these conditions is the result of the constitution of the *wakf* generally. And consequently when a *wakf* is made in favour of private individuals, the ultimate dedication is always reserved for such objects as the holy cities, a mosque, a caravanserai, a cemetery, a sanctuary, the poor, &c.

It is endorsed by a clause generally worded thus:—"And after the total extinction of the appointed beneficiaries the *wakf* should go to so and so." We may add that a pious act may be independent of the idea of charity. Sidi Khalîl expressly mentions this and Perron explains that the *wakf* would be valid and the act pious, even though the beneficiaries were in the most affluent circumstances.

The second condition is imperatively laid down by the text. "The constitution of a *wakf* in favour of a beneficiary who has attained his majority and even that in favour of a *non compos* is null, if the beneficiary is not placed in possession." "The taking of possession" says Mohammed Assem, "is the soul of the *wakf* and if the grantor continues to overlook and administer the *wakf* property *and to dispose of it*, this in itself renders the *wakf* null; the law cannot legalise it."

In the case of *wakfs*, as in the case of gifts, a clause is generally inserted in the deed of grant to the effect that the beneficiary has taken possession of it. This declaration is not always conclusive proof of the fact and requires to be supported by independent circumstances.

The beneficiary's possession should be either by him-

self, if adult, or by his father or guardian, if an infant. When the *wakf* is for a pious or religious purpose, possession should be taken by its administrator. The delivery of seisin is dispensed with only in case of a *wakf* made by a father in favour of his minor son, provided the circumstances sufficiently show that there was a *boná fide* intention to make a *wakf*, *e. g.* (*a*) that the produce of the *wakf* had been applied to the benefit of the *cestui qui trust;* (*b*) that the father did not himself continue to derive benefit therefrom.

When possession should be taken.

The taking of possession is therefore a necessary formality, but at what period should it take place? "The law does not dictate that this formality should immediately follow the deed of constitution; it only requires it to be accomplished while the constituent fulfils the necessary qualifications for establishing a *wakf;* that is, possesses the disposing capacity and is able to exercise the right of property over it." "The *wakf* is null," says Khalîl ibn Ishâk, "when it has not been taken possession of before the death of the grantor, or before the illness to which he succumbed." The wâkif has the power of subjecting the *wakf* to certain conditions, and these conditions must be strictly observed. He may determine the rite according to which it should be managed; appoint the person or persons to undertake the administration, settle the order of successive devolution, declare that the beneficiary in case of poverty should have the right to alienate the *wakf;* prescribe that in certain cases the *wakf* should revert to his heirs etc., etc.; and, in general, order all measures relating to the execution of the *wakf;* but *there* his power ends and any conditions contrary to the principle of *wakf* and by which a power is reserved to alter the provisions of the *wakf* or to annul the settlement, or to sell the immoveable property, in fact any condition which would have the effect of destroying the *wakf* is null and void.

According to Khalîl ibn Ishâk, perpetuity is not an essential condition of *wakf;* and his two commentators, al-Karkhi and Abdul Baki, explain further that temporary *wakfs*, those made for even a single year or for the lifetime of any given person, are lawful and valid, and that the produce of the *wakf* thus constituted where no beneficiary is indicated, after the expiration of the period for which the trust is created, will go the poor.

Temporary *wakf* lawful.

Can the wâkif annul the *wakf* of his own motion solely? Can he modify the prescribed clauses before the possession of the beneficiary? The jurists, among them Ibn-ul-Hajeb and Abdus-Salam have answered these questions in the negative. The constitution, such as it has been made, must remain intact and be carried into effect without any modification. And if the clauses of the wakf-namah are obscure, incomplete, or susceptible of diverse interpretations, the difficulty would be taken before the Kazi, who must pronounce according to the custom and usage of the place or according to the mode in which it has been hitherto carried into effect, if it has existed for some duration.

SECTION III.

THE LEGAL EFFECT OF A WAKF.

The constitution of property into *wakf* produces three different effects; It renders the property constituted as *wakf*, inalienable, imprescriptible and non-heritable. *Wakf* property is inalienable, because it belongs virtually to Almighty God, being intended for the benefit of mankind, the successive beneficiaries being entitled only to the usufruct thereof and not having the power to alienate it.

There are, however, several exceptions to this principle. If the *wakf* is of land or of moveable property that can

LECTURE XI. no longer be useful, it should be sold and others bought with the price thereof. If a mosque has to be enlarged, and if the sale of a piece of land attached thereto is the only mode by which funds can be forthcoming therefor, such sale would be permitted. If a beneficiary be poor and the produce of the *wakf* insufficient to procure for him the means of subsistence, alienation in this case might take place with the leave of the Kazi, should the grantor have made this the object of a special clause in the deed or even if he has not mentioned it.

If the founder should have died leaving debts, the creditors would be entitled to realize the debt from the property, and after their debts have been satisfied the balance of the sale proceeds should be invested for the benefit of the *cestui qui trust*. A *wakf* may be the object of an exchange, but such exchange would only be valid upon approval of the Kazi, after he has assured himself that the value of the two properties is equal. The exchanged property would then become *wakf* and would be subject to the same rule as the original *wakf*, and if the *wakf* had been for a specific purpose which fails, it will be applied to some other pious object,—if possible, similar in character to the original purpose ; for example, a wâkif constitutes some property into *wakf* and grants the produce thereof for constructing a bridge or a school, and if those buildings have been constructed by the State, the produce of the property would be applied to some similar object, in default of which the *wakf* would be applied to help the poor kindred of the wâkif, preferentially his *asabah*.

The inalienability of the *wakf* property ceases when the grant has been made in favour of a certain object which has ceased to exist.

Though the beneficiaries cannot dispose of *wakf* property they have the right to enjoy it and all its fruits. They are

entitled to hold possession of it either personally or by a manager or administrator. LECTURE XI.

Neither the *cestui qui trust* nor the administrator can grant a lease of the *wakf* property for a long period. According to Sidi Khalîl two years, according to others three years, is the longest term for which a lease may be given unless it is given to the next reversioner, when it may be for ten years. The lease may, however, be extended if the property needs repair. It is a principle that property held as *wakf* must be kept in good repair, and that future beneficiaries can, in order to preserve their rights, oblige the usufructor to lease the house that is falling into ruin and to apply the rent wholly to its reconstruction and repair.

(*b.*) The second effect of the constitution of *wakf* is to render the property imprescriptible, that is, it cannot be subject to the rights of the sovereign as private property.

(*c.*) The third effect resulting from the constitution of *wakf* is, that it renders the property so dedicated non-heritable, and subjects the course of descent in respect of the beneficial interest, to the succession pointed out by the wâkif. On this point all writers agree, "the rules of succession to *wakf* property laid down by the grantor must be strictly observed," says Sidi Khalîl, and Ibrahim Halebi adds, that "the founder is absolute master to dispose of at will the usufruct of this property."

CHAPTER XIV.

THE LAW OF WAKF ACCORDING TO THE SHÂFEÏ SCHOOL.[1]

LECTURE XI. It is essential that the wâkif should be capable of declaring his will, and that he should have the faculty of disposition over his property, while the subject of the endowment must be such as can be made use of perpetually. Therefore, the object of the endowment may not consist of aliments or odoriferous plants; but with that exception, the *wakf* of moveable property is as valid as that of immoveable property. The *wakf* of *mushaá* or property held in joint tenancy is valid. But it is not valid to make a *wakf* of a trained dog. The validity of a *wakf* of buildings or plantations upon another person's ground held by the owner of the buildings or plantations under a lease is acknowledged.

A *wakf* in favour of an individual or a class is not valid, if they are not capable of taking possession constructively or actually of the *wakf* property. A *wakf*, therefore, in favour of an infant *en ventre sa mere* or a slave is not valid.

It also appears from the above principle that a *wakf* may be made in favour of a *zimmi* but not in favour of an apostate, nor of an unbeliever not subject to a Mussalman prince, nor *in favour of one's self*.[2] A *wakf* for an unlawful purpose, as for example, the construction of Christian churches or of synagogues is void; but a *wakf*

[1] The following is from the Minhâj-ut-tâlibîn.

[2] Comp. the Hanafi and Shiah Law.

in favour of an hospital for Christians or Jews, made as it is with a charitable object, is lawful. A *wakf* is valid equally in favour of the poor as of the rich, of the learned, of mosques or schools.

The intention of making a *wakf* must be formulated in these explicit terms, "I make a *wakf* of such a thing," or "my field shall be a *wakf* in favour of such a person." The expressions "I consecrate," or "I attribute to such charity" are also explicit. The same is the case with the expressions, "I make a sacred gift of such thing," or "endow," or "it shall not be sold or given to another person." On the other hand, the expression "to give" without any further qualification cannot be considered explicit, even if the intention was to make a *wakf*, and it is only in the case of a *wakf* not in favour of one or more individuals but in favour of a class of people or of the public that this expression accompanied by the intention is regarded as explicit. The expressions, "I consecrate such an object," or "I wish that it should remain eternally in that state," are not explicit; but the phrase "I destine such a property for the purpose of a mosque" suffices to make the spot consecrated to worship.

A *wakf* in favour of a certain and particular person is not complete without his acceptance, which acceptance must in no case take place after a previous refusal. A *wakf* made in these terms, "I constitute this my land *wakf* for the term of a year" is void, but if the words used are "I make a *wakf* in favour of my children, or in favour of such an one and subsequently upon his issue," without adding anything else the *wakf* remains intact even after the extinction of the family. The usufruct of the *wakf* reverts to the nearest relative of the founder when the purpose fails and the holders nominated by him have become extinct. Furthermore, our school declares null and

LECTURE XI. void such *wakfs* as are made without appointing a primary holder of the usufruct capable of taking immediate possession thereof; for example, when a *wakf* is made in the following terms, "I make a *wakf* in favour of the child I may have," this is invalid for there is nobody to take possession of the *wakf*, but the failure of any of the intermediate beneficiaries does not avoid the *wakf*.

The law does not acknowledge a *wakf* that has no object; nor can it be made dependent upon a contingency which may never occur. As for example "I make a *wakf* on condition that Zaid should come." While a conditional option is also invalid. The other conditions that may be added must be executed faithfully, as for example, the condition that the endowed lands cannot be let out, or that a mosque founded be specially dedicated to a certain rite, such as the Shâfeï. In this latter case, the members of this sect alone shall be entitled to share in the benefit of the *wakf*. And this rule applies equally to the founding of a school or of a hostelry. In the case of an endowment in favour of two persons and subsequently in favour of the poor, at the death of one of them his portion of the usufruct reverts to the other and not to the poor,[1] who only profit thereby after the death of both. This doctrine has been supported by Shâfeï himself.

When a *wakf* is constituted in the following terms, *viz.*, "the *wakf* is for my children and my grandchildren," the usufruct must be equally divided among the children and the grandchildren that exist at the time of the *wakf*, even if the words "who are their descendants" or "generation after generation" is added.[2] When on the other hand the following terms have been used "in favour of my children then of my grandchildren,

[1] Comp. the Hanafi Law, *ante*, p. 289.

[2] Comp. *ante*, pp. 289-296.

then of my great-grandchildren, the ones after the others," or "the former first," the successive generations have the enjoyment of the usufruct and the first class takes first. The grandchildren, moreover, have no right to a *wakf* made only in favour of children. While, on the other hand, the grandchildren born of the daughter of the founder are understood in the expressions "posterity", "descent", "progeny", or "grandchildren" unless it has been declared "the grandchildren that bear my name." "A *wakf* made in favour of persons between whom and me there are ties of patronage" must be divided into two equal portions, if the founder is a client as well as a patron, but according to some jurists it is null. An apposition preceding several words joined together refers to all, as for example in this sentence, "I make a *wakf* in favour of those who are dear to me, my children, my grandchildren and my brothers," it is the children, grandchildren and brothers that are accounted "dear" by the founder. The same is the case with an apposition that follows and of the reservation added to the principal clauses provided that these words are united by the conjunction "and." For example, "I make an endowment in favour of my children and of my grandchildren and of my brothers who are dear to me" or "provided there are no persons of notoriously bad conduct among them."

The proprietorship of *wakf* property is transferred to God, that is to say, that such object ceases for ever to be subject to the right of private proprietorship and that thenceforth it belongs neither to the founder nor to him in whose favour the *wakf* was made. Only the usufruct of the *wakf* is his, and he may have the enjoyment thereof either in person or by the intermediation of another, for example, by lending him the endowed object or letting it

LECTURE XI. to him. The holder of a usufruct has the full right to the rent and of that which the endowed property produces, such as fruits, wool and milk, and the young of the animals, though another theory maintains that the divers offspring also become *wakf* by virtue of the right of accession. After the death of a *wakf* animal, the skin belongs to the holder of the usufruct. On the other hand, according to our school, the indemnity due from the murderer of a *wakf* slave does not belong to the holder of the usufruct, but he must use that money in purchasing another slave who then becomes *wakf* in lieu of the murdered slave, or in case this be impossible, he must use that money to purchase an undivided portion of a slave to replace that one.

The endowment of a tree does not, according to our school, become extinct when the tree dies, as the decay of a tree does not preclude the use of the wood, though, according to others, the tree must then be sold by auction and the price used in the same manner as the indemnity for the murdered slave. The worn-out mats and the broken beams of a mosque may be sold, and this is only lawful on condition that these articles should serve as fuel. The ground on which a mosque stands may, in no case, be sold even if the edifice have fallen to ruin and its reconstruction be impossible.

When the founder has reserved for himself the administration of the *wakf*, or if he has conferred the office upon a third person, the arrangement must be carried into effect; but if nothing of this kind has been stipulated by the grantor, our school prescribes that the administration should be entrusted to the Judge. It is essential that the administrator of a *wakf* be of irreproachable character and qualified for the office both by his physical powers and intellectual faculties. The functions of the adminis-

trator are the custody and consolidation of the *wakf* property and the collecting and distributing of the revenues, but he is forbidden to overstep the limits of his power, if the administration has only partly been given to him. In every case, the founder has the right of deposing his administrator and of appointing another, unless he be nominated administrator in the deed of endowment itself. A lease contracted by an administrator remains the same notwithstanding a rise in price or of a more advantageous offer.

CHAPTER XV.

RULES OF PROCEDURE.

Lecture XII.

As regards the right of a beneficiary to obtain a declaration that a certain property is *wakf* property, or to establish his title to a share in the proceeds of a certain *wakf*, the Mahommedan law is very distinct. It provides that any beneficiary can at any time proceed before the Kazi and obtain any redress to which he may be legally entitled. The law imposes no restriction as to the manner in which he should proceed. The Indian Legislature, however, has, with respect to a certain class of cases, provided certain rules which require consideration, especially as the Calcutta and Allahabad High Courts are not in accord with each other in regard to the procedure.

In Mahommedan countries, endowments which are in their nature public, or the benefits of which are for the public generally, are under the direction, control and supervision of a special officer appointed by the Government, who is called the *Názir-i-Awkáf*. But the Kazi, as the representative of the sovereign, is the general curator of all *wakfs*, whether public or private. When the British first assumed the government of these Provinces under the authority of the Mogul Emperor, they found numerous endowments, chiefly created by the sovereigns and chieftains, scattered throughout the country. For a time matters were allowed to remain in the condition of disorder in which the collapse of the Mahommedan Government had left the endowments. But in 1810 it was found

necessary to pass a law for the purpose of protecting and preserving these dedications and grants. With that object Regulation XIX of 1810 was passed. Its objects is sufficiently clear from the preamble.[1] LECTURE XII.

In 1863, however, it was considered desirable on the part of Government to divest itself of all connection with the religious endowments of Hindus and Mahommedans, and to retain the control only of such institutions as were secular in their character. It was supposed that the connection of a Christian government with the religious establishments of Hindus and Mahommedans was anomalous and inexpedient. To give effect to this mistaken but intelligible policy, Act XX of 1863 was passed.[2]

[1] "Whereas considerable endowments have been granted in land by the preceding governments of this country, and by individuals for the support of mosques, Hindoo temples, colleges and for other pious and beneficial purposes and whereas there are grounds to suppose that the produce of such lands is in many instances appropriated contrary to the intentions of the donors to the personal use of the individuals in immediate charge and possession of such endowments, and whereas it is an important duty of every Government to provide that all such endowments be applied according to the real intent and will of the grantor, and whereas it is moreover essential to provide for the maintenance and repair of bridges, serais, kuttras and other buildings which have been erected either at the expense of Government or of individuals for the use and convenience of the public, and also to establish proper rules for the custody and disposal of nuzzool property or escheats the following rules have been enacted to be in force from the period of their promulgation throughout the provinces immediately dependant on the presidency of Fort William.

"The general superintendence of all lands granted for the support of mosques, Hindoo temples, colleges and for other pious and beneficial purposes, and of all public buildings, such as, bridges, serais, kuttras and other edifices is hereby vested in the Board of Revenue and Board of Commissioners in the several districts subject to the control of those Boards respectively."

[2] "Whereas it is expedient to relieve the Boards of Revenue and the Local Agents in the Presidency of Fort William in Bengal and the Presidency of Fort Saint George from the duties imposed on them by Regulation XIX of 1810 of the Bengal Code, so far as those duties embrace the superintendence of lands granted for the support of mosques or Hindoo temples and

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The preamble and the earlier sections of this Act indicate conclusively its scope, and there can hardly be any doubt that its operation was confined to such trusts or endowments as were transferred to trustees under Sections 4 to 7 of the Act. And so it was expressly decided in the case of *Delroos Banoo Begum* v. *Nawab Syed Asghur Ally Khan*,[1] in which it was further held that

for other religious uses, the appropriation of endowments made for the maintenance of such religious establishments, the repair and preservation of buildings connected therewith and the appointment of Trustees or Managers thereof or involve any connexion with the management of such religious establishments and whereas it is expedient for that purpose to repeal so much of Regulation XIX, 1810 of the Bengal Code and Regulation VII, 1817 of the Madras Code as relate to endowments for the support of mosques, Hindoo temples or other religious purposes, it is enacted as follows:—

1. So much of Regulation XIX, 1810 of the Bengal Code and so much of Regulation VII, 1817 of the Madras Code as relate to endowments for the support of mosques, Hindoo temples or other religious purposes are repealed."

Section IV furnishes the chief index to the object of the Act.

"In the case of every such mosque, temple or other religious establishment which at the time of the passing of this Act shall be under the management of any Trustee, Manager or Superintendent whose nomination shall not vest in nor be exercised by nor be subject to the confirmation of the Government or any public Officer the Local Government shall as soon as possible after the Act transfer to such Trustee, Manager or Superintendent all the landed or other property which at the time of the passing of this Act shall be under the superintendence or in the possession of the Board of Revenue or any local Agent and belonging to such mosque, temple or other religious establishment except such property as is hereinafter provided and the powers and responsibilities of the Board of Revenue and the local Agents in respect to such mosque, temple or other religious establishment and to all land and other property so transferred except as regards acts done and liabilities incurred by the said Board of Revenue or any local Agent previous to such transfer shall cease and determine." Section V provides the procedure in cases of dispute regarding the right of succession in case of a vacancy in the office of any trustee &c. to whom property has been transferred under Section IV and Section VI declares the rights, powers and responsibilities of such trustees.

[1] 15 Beng. L. R. p. 167.

where such transfer had taken place, parties interested in such endowments might come in and apply for leave to sue the trustee or manager thereof,[1] and no suit would be maintainable without leave previously obtained under Section 18. But where the charge of the endowments had never been transferred to trustees under the provisions of the Act, no preliminary leave was necessary. In fact, the transfer under Sections 4 to 7 was regarded as a test whether the endowment was, in its nature, public or not. If it had been taken charge of by the Board of Revenue under Regulation XIX of 1810, and subsequently transferred to trustees under Act XX of 1863, *primâ facie* it was such as to entitle the public generally to share in its benefit. And in that case preliminary leave to sue would be necessary before a suit can be maintained. The principle laid down in *Delroos Banoo Begum* v. *Nawab Syed Asghur Ally* with reference to the nature and scope of Act XX of 1863 has been virtually overruled by the decision in *Jan Ally* v. *Ram Nauth Mundul*.[2] In this case it has been held, in effect, that every mosque, Hindu temple, college or religious institution for the support of which land had been granted by the preceding governments, or by individuals come within the purview of the Act, and that consequently no suit can be instituted with reference to any of these institutions without leave having been first obtained under Section 18.[3] This ruling apparently was adopted in another case decided by the Calcutta

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Jan Ally v. *Ram Nauth Mundul.*

[1] *Kaniz Fatima* v. *Bibi Sahebjan*, 8 W. R. p. 313.

[2] I. L. R. 8 Cal. p. 32.

[3] Section 18 runs thus :—"No suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit. The application may be made upon unstamped paper. The Court on the perusal of the application shall determine whether there are sufficient *primâ facie* grounds for the institution of a suit, and if in the judgment of the Court there are such grounds, leave shall be given for its institution &c."

LECTURE XII. High Court.[1] In this case the plaintiff had sued to recover possession as mutwalli of certain parcels of land alleging that they were dedicated as *wakf*, and that the profits were applied to the feeding of wayfarers and travellers, to lighting the mosque and shrine in the evening, and to meeting the expenses of repeating prayers on the occasion of *Id* and *Bakreed*, and that the said profits were never spent for personal purposes. The plaintiff also alleged that her deceased husband had been the former mutwalli, that upon his death her step-son took possession of the *wakf* properties and had since given a mokurruri pottah of the dedicated lands to the second defendant. She accordingly prayed that the properties in suit may be declared to be *wakf* and the sale and lease thereof may be set aside.

She succeeded in establishing that the four parcels of the land in suit were *wakf* and obtained a decree in respect thereof in the first Court which was upheld by the judge. On special appeal to the High Court of Calcutta, it was urged on behalf of the defendants that the plaintiff had no sufficient interest to entitle her to sue. These contentions were accepted by the learned judges who dismissed the plaintiff's suit on the following grounds :—

"According to the plaint in this case the trust is one partly for charitable and partly for religious purposes. So far as the trust was 'for the feeding of wayfarers and travellers' it was a trust for the benefit of a considerable portion of the public answering a particular description, and was therefore a trust for a public charitable purpose. The object of the plaintiff's suit was to oust the mutwalli, get herself appointed in his place and have the properties vested in her. Section 539 of the Code applies to a suit of this nature which is really one for the administration of

[1] *Lutifunnissa Bibi* v. *Nazirun Bibi*, I. L. R. 11 Cal. p. 33.

the trust, and such a suit can only be brought in accordance with the provisions of that section. But even supposing that the endowment in the case was neither a public charity within the meaning of Section 539 of the Civil Procedure Code nor a religious endowment to which Act XX of 1863 is applicable, the plaintiff was not entitled to sue alone to be appointed mutwalli and to obtain possession of the property. The first Court holds that she was entitled to bring this suit because she was a wife of Mokram Ali the late mutwalli, but we cannot agree that this is a sufficient reason. Even if we regard her as suing as a person interested in the trust, then on the face of the plaint there are other persons interested, and she could only sue on behalf of all who were so interested, and in order so to sue she should have obtained the permission of the Court and otherwise complied with the provisions of Section 30 of the Civil Procedure Code, not having done so we think she had no right of action. In whatever light the suit be regarded, therefore, we think it clear that it was not properly framed and will not lie."

Zafaryab Ali v. Bakhtawar Sing.

This view does not seem to be in accordance with the Mahommedan Law as it introduces restrictions not recognized under that law. The Allahabad High Court has dissented from the views entertained by the Calcutta High Court. It has held that every Mahommedan has an inherent right to maintain a suit for the purpose of establishing a *wakf* or his own right to share in its benefits. In the case of *Zafaryab Ali* v. *Bakhtawar Sing*[1] certain Mahommedans sued for possession of a "takia" known by the name of Najuf Ali Shah, "by cancellation of an hypothecation thereof, dated the 28th May 1877 and of a decree, dated the 18th May 1880 as well as of a judicial sale, dated the 30th May 1881, by the demolition

[1] I. L. R. 5 All. 497.

LECTURE XII. of two walls and by the ejectment of the defendants." They alleged in their plaint that the property in suit was "*wakf*" or a charitable endowment including a mosque (imambara) and a grave-yard in which there were many tombs, * * * * * that defendant No. 1 the manager of the property and the ancestors of defendants Nos. 2, 3 and 4 hypothecated the premises to defendant No. 5 who having obtained a decree enforcing the hypothecation caused the property to be brought to sale, and it was purchased by him and defendants Nos. 6 and 7, that defendant No. 5 having obtained possession of the property erected two walls on the land thereby interfering with the purposes for which the property was originally intended, and that the plaintiffs became aware of all these proceedings on the 24th January 1882 and in consequence brought the present suit. The defendants set up as a defence to the suit that the plaintiffs were not competent to sue. The court of first instance held that the plaintiffs were competent to sue, observing as follows :—

"It is a rule of daily practice that every aggrieved party is entitled to get his grievance remedied. On the same principle a certain set of the interested Mahommedans in this case have come forward to bring this suit against the defendants to get their complaint redressed by the Courts of Justice. The Mahommedan Law sanctions the course of action by the plaintiffs in this case. Every Mahommedan according to the tenets of his religion is entitled to get public charitable property protected from the hands of strangers."

On appeal, however, the judge reversed the decision of the first court holding that the plaintiff had no right to sue. He also made the following observations :—

"Referring to a recent and closely analogous case decided by the Presidency Court in August last, *Jan Ali* v. *Ramnauth Mundul*,[1] I am of opinion that the plaintiffs have no right to bring the present suit which is to have the property declared *wakf* and made over to them as such.

[1] I. L. R. 8 Cal. p. 39.

They do not, however, pretend to be the trustees or to have any special interest in the alleged endowment, nor do they bring forward any deed creating it; I do not think that this brings the suit under Act XX of 1863, for they do not really mean to sue the manager for misfeasance although they have included him in the prayer to set aside his conveyance. But even if it did, the suit is out of rule as there was no application made to this court or to any other for permission to sue. If it be alleged that there has been a breach of trust regarding a charitable endowment then the leave of the Collector ought to have been obtained under Section 539, which has not been done. The plaintiffs, moreover, have not made any assertion in any part of their plaint as to any special right of suit, as to their being persons attending or having a right to attend the alleged mosque, but simply state their ground of action to have arisen when they heard of the alienation to the defendants. Were this suit brought by the latter, the courts could deal with it, but a question (such as lies at the root here) of whether a place was one of public worship, &c., would be more appropriately settled by the Municipal Commissioners of the town as it certainly would be more legal to adopt such a course. For this reason I dismiss the suit."

In second appeal, the plaintiffs contended (1) that being members of the Mahommendan community they were legally competent to maintain the suit; (2) that they were not bound to observe the preliminary procedure enjoined by Section 539 of the Civil Procedure Code, that section having no bearing on the suit; and (3) that the Lower Appellate Court had misapprehended the scope of the suit which did not seek any of the remedies provided by that Section.

The High Court of Allahabad reversed the second Court's judgment, holding as follows :—

"The plaintiffs as Mahommedans, entitled to frequent the mosque and to use the other religious buildings connected with the endowment, can clearly maintain the present suit, and Section 539 of the Procedure Code has no application to such a case; the endowment in question being, in our opinion, a religious institution within the meaning of Section 24 of Act VI of 1871, and therefore governed by Mohammedan Law. We therefore remand the case under

LECTURE XII. Section 562 of the Code of Procedure for trial on the merits."

Jawahra v. *Akbur Hossain.*

In the later case of *Jawahra* v. *Akbur Hossain*[1] which was decided by a Full Bench of the same Court, the question as to the right of a Mahommedan to maintain a suit for the establishment of his right to use a mosque for purposes of devotion was discussed at considerable length.

The plaint in this case stated that in a village belonging to the plaintiff there was an "old dilapidated mosque intended for Mahommedan worship" which "was protected and looked after" by him and other Mahommedans of the village; that in consequence of the mosque and its appurtenances being *wakf*, it had been excluded from the partition of the village, and the plaintiff intended to repair the mosque; that the defendants had enclosed a part of the land and had also erected a mill on a part of it; that they had by means of certain erections of thatch and mud converted the mosque into a place for storing straw, all of which acts they had wrongfully done; that the plaintiff had remonstrated with the defendants and asked them to remove the thing, but they paid no attention to this request, and prevented the plaintiff from making repairs; and that these "unlawful acts of the defendants were calculated to affect the character of the said endowed property and were an insult to the religion." Upon these allegations the plaintiff claimed "a declaration of his right to repair the old dilapidated mosque ...... by removal of the defendants' interference" and the demolition of the compound, by removal of the mill, the thatches and the straw stored in the mosque. The plaint concluded with these words—"Suit brought according to the doctrines of the Mahommedan religion and on written and oral evidence." The defendants did not deny the

[1] I. L. R. 7 All. p. 178.

acts imputed to them by the plaintiff. They defended the suit upon the grounds, amongst others, that the building which was the subject-matter of the suit was not a mosque but an "atta or fortress made for the purpose of shelter from robbers in former days" and that the plaintiff had no right to repair it. The Court of first instance found that the building was a mosque and not an "atta" and held that "the plaintiff as a Mahommedan and guardian of religious buildings was entitled to repair the mosque." It, therefore, gave the plaintiff a decree as claimed. On appeal the defendants contended that "a claim for endowed property cannot be instituted and heard without the permission of the Advocate General under Act XX of 1863." Upon this point the Court observed as follows :— LECTURE XII.

"The first ground of appeal must be overruled. In a similar case—*Zafaryab Ali* v. *Bakhtawar Singh*[1] our own High Court have just ruled that Section 539 of the Civil Procedure Code would not apply, and that the plaintiffs as persons entitled to frequent the mosque can maintain the suit. This, however, is quite opposed to a ruling of the Calcutta High Court, *Jan Ali* v. *Ram Nauth Mundul.*"[2]

The decree of the Court of first instance was accordingly affirmed.

On second appeal the defendants contended (1) that the suit was not maintainable in its present form as no special right to sue in the plaintiff was disclosed, and (2) that as there were probably other Mahommedan residents in the village the suit was not maintainable without compliance with the provisions of Section 30 of the Civil Procedure Code.

Upon these facts and contentions, Chief Justice Petheram delivered the following judgment:[3]—

[1] I. L. 5 All. p. 497. [2] I. L. 8 Cal. p. 39.

[3] The importance of this judgment is so great that I have been impelled to give it *in extenso*.

LECTURE XII. "I have no doubt that the plaintiff was competent to maintain this action. The question has arisen in consequence of the peculiar way in which property of this kind is held. According to Mahommedan custom, the property in a mosque and in the land connected with it is vested in no one. It is not the subject of human ownership, but all the members of the Mahommedan community are entitled to use it for purposes of devotion whenever the mosque is open. Now, the Mahommedans are only a part of the population of this country, so that the right is not vested in the general public, and therefore it resembles a right in a private way. Every one who has such a right is entitled to exercise it without hindrance, and has a right of action against any one who interferes with its exercise. It is not a joint right, it is a right which belongs to many people. Section 30 was meant to apply to a case in which many persons are jointly interested in obtaining relief; and where under the old law it would have been necessary for all of such persons to be joined, Section 30 prevents the record from being unnecessarily encumbered by many names, and allows one or more with the permission of the Court to sue or defend on behalf of all. The rule was introduced in order to prevent rich persons from joining together and putting forward a pauper to conduct the suit and thus escaping all costs. In the present case it is clear that an individual right has been violated, and that an action will therefore lie." Mr. Justice Mahmud's remarks are also well-worthy of consideration :—

"I wish to add a few observations regarding the Mahommedan Law as to endowments generally, and in particular as to mosques. It must, in the first place, be shown that the Mahommedan people have a right to maintain a suit like the present. But authorities on such a point

need not be cited for the principle is too well-known among Mahommedan lawyers. The rule of the Mahommedan Law on the subject is that when any one has resolved to devote his property to religious purposes, as soon as his mind is made up and his intention declared by some specific act, such as, delivery, &c., an endowment is immediately constituted; his act deprives him of all ownership in the property, and to use the technical language of Mahommedan lawyers, vests it in God in such a manner as subjects it to the rules of divine property whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to His creatures."

"A mosque is an endowment of this kind, and the Mahommedan community or any member of it has a right to enter the mosque and to pray there. The learned Chief Justice has shown that under the circumstances in India a mosque cannot be regarded as vested in the public at large, but in the Mahommedan part of the public, and it cannot be said that any Mahommedan is bound to maintain a suit on behalf of the public generally. The right of a Mahommedan to use a mosque is, as the learned Chief Justice has said, like the right to use a private road; any one who has the right may maintain a suit in respect of it. This settles the question as to Section 30 of the Civil Procedure Code. That Section applies only to cases where no individual right is interfered with, but here we have the case of a mosque in a small village, and one of the worshippers in that mosque is obstructed in his use of it for purposes of devotion. He had a private right and it was violated. In regard to Section 539 of the Civil Procedure Code, I was one of the Bench who made this reference, and I wish to add my reasons for holding that the Section does not apply to the present case. There is

LECTURE XII. here no question of trust or trustee or of malversation of trust funds or other breach of trust. The object of such a suit as this, is not such as is contemplated by any of the various clauses of Section 539. In conclusion I have a few words to say regarding the case which has been cited, *Jan Ali* v. *Ramnauth Mundul*[1] decided in the Calcutta High Court by Prinsep and Field, JJ. Towards the end of the judgment in that case, the following observations occur: 'Now so far as regards these prayers we think that the plaintiffs were not authorized to institute this suit merely by reason of having that interest which is set out in para. 10 in the plaint, that is an interest created by their being followers of the Moslem religion living in the vicinity of the mosque and being in the habit of attending the musjid. That interest is common to them with a large number of other persons—common to them with, we will not say all the Mahommedan population of the country, but certainly with all the Mahommedan residents in the vicinity, and we think that this is a case which falls within the provisions of Section 30 of the Civil Procedure Code. That Section enacts that 'where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court sue or be sued, or may defend in such suit on behalf of all parties so interested.' It may be quite possible that if these plaintiffs had applied to the Court under the provisions of Section 30, they would have obtained permission to institute this suit, but not having obtained that permission, they certainly were not entitled to institute the suit; and under the circumstances we think that the ground of objection taken by the defendants in the second paragraph of their written statement and which forms the subject of the second issue was a good

[1] I. L. 8 Cal. p. 39.

objection, and that this suit was properly dismissed by the District Judge.' Now with all due deference to the learned Judges who delivered that judgment I dissent from the remarks which I have just read. I hold that it is an undoubted principle of Mahommedan Law that the persons who have the most direct interest in a mosque are the worshippers who are entitled and accustomed to use it. It is impossible to imagine whose interest in the mosque can be direct if theirs is not, and I should say that even if this case fall under the purview of Section 539 they would have *locus standi* to maintain the suit. But for the reasons which I have already given I am of opinion that neither Section 30 nor Section 539 of the Civil Procedure Code applies to the present case, and that the plaintiff was competent to maintain the suit." LECTURE XII.

The judgment of the Allahabad High Court seems to be in conformity with the provisions of the Mahommedan Law. As has been already pointed out from the Radd-ul-Muhtâr and the Fatâwa-i-Kazi Khan, every Mahommedan who derives any benefit from an admitted *wakf* is entitled to maintain an action against the mutwalli, to establish his right thereto, or against a trespasser to recover any portion of the *wakf* property which has been misappropriated, without joining any other person who may participate with him in the benefit. Unless therefore an endowment has been dealt with under Reg. XIX of 1810 and Act XX of 1863, and has come into the possession of trustees under this later Act, no leave seems necessary. Again, Section 539 of Act XIV of 1882 (the Civil Procedure Code), refers to "trusts created for public or religious purposes" exclusively.

To make the provisions of this section applicable to a *wakf*, it must appear that the trust is for a public chari-

LECTURE XII. table or religious purpose,—in other words, that it is vested in the public, or that the beneficiaries are selected from the general body of the public.

A Mussulman mosque, (unless it is a *musjid-i-jáma*,) a private Imambara, *wakfs* created for the disbursement of private charity (such as appeared in the case of *Lutif-unnissa Bibi* v. *Nazirun Bibi*,) or for the benefit of a more or less restricted body of people is not regarded by the Mahommedan lawyers to be vested in the public or that the public have any interest in them. The Mahommedan law makes a broad distinction between *wakfs* which are public in their nature and which are private. The *wakfs* in which the public have any interest and which perhaps may come within the scope of S. 539 are the *masá-lih-i-ámma, e. g.*, public or *jáma-musjids*, bridges over which the entire body of the public has a right of way, caravanserais where anybody and everybody can alight; public hospitals; *lungar-khanehs;* public cemeteries; public libraries, public Madrassahs and public Imambaras, like the Imambara of Mahommed Mohsin at Hooghly.

What are public trusts under the Mahommedan Law.

With reference to such *wakfs* as are private or only *quasi*-public, the provisions of S. 539 are in no way applicable. And if they were not taken charge of under Reg. XIX of 1810, and were not transferred to trustees under Act XX of 1863, the provisions of this Act, would not apply.

In respects of such *wakfs*, therefore, it is submitted the right to bring a suit would be regulated by the general provisions of the Mahommedan Law.

It has already been remarked[1] that where the nature of the *wakf* is undisputed, or where the fact of the property being trust-property is admitted and there are several trustees, one or more of them can bring a suit in respect of the trust-estate without joining the others.

[1] See *ante*, p. 265.

If there is no trustee or none willing to act, any one of the beneficiaries or some of them can sue on behalf of the others without leave of the Kazi. If there is any dispute regarding the *wakf*, some of the trustees, and in their absence, some of the beneficiaries can sue on behalf of the others with the permission of the Kazi. A suit to recover property alleged to be *wakf* belongs not to the heirs or descendants of the settlor but to the mutwallis jointly.[1] But a person who has been convicted of having misappropriated *wakf* property cannot obtain the assistance of the court to recover the property in order to enable him to exercise the office of mutwalli.[2]

The beneficiaries of a *wakf* or some of them are entitled to maintain a suit to restrain the mutwalli from wasting the trust-estate or misapplying it.[3]

Bechu Lal v. Oliullah.

Regarding the procedure to be observed when there are several mutwallis and some of them are unwilling to join the others in bringing a suit to recover alleged trust-property, the ruling in the case of *Bechu Lal* v. *Oliullah*[4] is in point. In that case it was held that where there are several mutwallis, all of them, if possible, should be made plaintiffs; but if any of them refused then they should be made defendants.

It would seem, however, from the following principles that the ruling in this case falls short of the Mahommedan Law:—

"If the appropriator do not appoint a mutawalli until death comes on him and then give directions to some persons (as to how he is to act after his death,) such person will become the *wasi* of his estate and effects, and will

[1] *Phate Saheb Bibi* v. *Damodar Premji*, I. L. R. 3 Bom. 84.

[2] *Aga Mahommed Kumul Tehranee* v. *Aga Abbas Tehranee*, S. D. A. 1859, p. 285.

[3] *Abdur Rahman* v. *Yar Mahommed*, I. L. R. 3 All. 636.

[4] I. L. R. 11 Cal. 338.

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Principles of procedure.

be the mutwalli of his *awkâf*. Hillal has stated that the executor will be associated with the mutwalli in the work of the trust [in the same way] as if he also was appointed a mutwalli therefor, as is stated in the *Muhît*. And if he makes one person the mutwalli of his *wakf* and then appoints an executor, the latter will become a partner of the mutwalli in the governance of the *wakf*." [1]

"If there are two mutwallis of a *wakf* appointed by the Kazis of two different cities, according to the Shaikh Imam Zâhidi, each of them will be entitled to administer the properties within the jurisdiction of the Kazi appointing him."

"If the wâkif entrusts the governance of the *wakf* to two persons, or to a mutwalli and a *wasi*, neither of them would be entitled singly to sell the proceeds of the *wakf*, though, according to Abû Hanifa, each might act with the sanction of the other when the person acting would be regarded as the mandatory of the other, so it is stated in the Hawi."[2]

"If two wakifs join in making one dedication and jointly appoint two mutwallis both these mutwallis would be like one. If they are separately appointed by two different Kazis of two different places, they may each act as far as the property within their respective jurisdictions is concerned according to Imam Ismail Zahidi." [3]

"Some of the beneficiaries can sue on behalf of the others. So also some of the mutwallis can stand[4] as litigants on behalf of the entire body; this is like the position of a *wasi-bin-nikah*, (a guardian for marriage); all these guardians, if more than one and belonging to the same class, stand on the same footing, and therefore if one

[1] Alamgiri, II, p. 505. [1] *Ibid*, p. 509. [2] *Ibid*, p. 506.

[3] Fatâwa-i-Kazi Khan, IV, p. 304-306.

[4] The word used here is (ينتصب) which is intransitive and means can stand or can be constituted.

of them is authorised by the others to consent on behalf of all, no outsider can raise any objection."[1] LECTURE XII.

"A *cestui qui trust* cannot lay a claim without leave of the Kazi for the recovery of any property which has been wasted or usurped, unless the *towliut* is in him also, but he can sue the mutwalli if *he* is a *ghâsib*, or to establish his title to a share in the profits of the *wakf*."[2]

"The position of a mutwalli and an executor is alike. The dealing of one of two *wasis*, like the acts of one of two mutwallis is void, for the two mutwallis and the two executors are like one in certain matters. This is the saying of the *Ashbâh* and *Kinia*. The result is, that if one of two executors, or if one of two mutwallis were to give an ijâra of the *wakf* land, it will not be valid, without the assent of the other, though both may have been appointed separately. Some jurists have no doubt held that they can act separately. And Abu Lais has held that this is the approved doctrine, and we ought to adopt it. But the first doctrine is mentioned in the *Mabsút* as the correct one, and it has been accepted in the *Durrur* and Kahastâni has stated that it is the right view." The commentator then proceeds to say, "My view is, that this is so when the two mutwallis or the two executors have been appointed by the wâkif or testator or by one Kazi. Accordingly, the act of one will be valid when ratified by the other, and no renewal of the obligation will be necessary as is mentioned in the *Manah*. So is the position of an executor associated with a mutwalli. And it is mentioned in the *Hâmidia* from the *Ismailya*, that if a *wasi*, without the knowledge of the mutwalli deals with the estates and some of it is lost, he would be liable for damages."[3]

[1] Radd-ul-Muhtâr, III, p. 406. [2] I. L. R. 3 All. p. 636.
[3] Radd-ul-Muhtâr, V, p. 689.

LECTURE XII. "But the acts of one of two executors or of one or two mutwallis are valid in respect of the buying of shrouds for the testator or wâkif and his funeral, and in demanding and litigating for the debts due to his estate and for his *rights*. The doctrine of the lawfulness of one mutwalli or of one executor demanding by himself the dues to the estate of the deceased or bringing a suit therefor is founded upon reasons of necessity. [For example, the other executor may refuse to act, and owing to his conduct, the *wakf* property may be about to be wasted or the other mutwalli is absent.] So it is mentioned in the *Nikâya*, and its commentator Kahastâni implies the same. The right to litigate is supported by the *Zakhîra*. But Abû Yusuf has held that either mutwalli can act by himself, unless the wâkif has expressly provided that they must act together.[1] If one mutwalli refuses to act he must be taken to have renounced the trust. And the other mutwalli can act for the protection of the estate until the Kazi has appointed another or authorised him to be the sole mutwalli."[2]

"The permission for one mutwalli alone to bring a suit without joining the others is founded on the reason that they cannot act jointly in preferring their claim and even should they join, only one can be allowed to plead. This is in the *Durrur*."[3]

"When a person has appointed two executors, and one of them dies appointing the other as his executor, the surviving executor can act for the original testator as a sole executor."[4]

"If one man appoints two executors, according to Abû Hanifa and Mohammed, neither of them can act singly in dealing with the properties of the testator, and the

[1] Radd, III, p. 690.
[2] Kazi Khan on Wills, p. 434.
[3] Radd, p. 690.
[4] Kazi Khan, p. 441.

acts and dealings of one of them are not valid without the permission of the other, except in certain matters, *viz.*, the funeral of the deceased, the payment of his debts and legacies, the emancipation of his slaves, the restoration of deposits and usurped properties. But they cannot act singly in taking possession of properties and debts restored to, or paid to his estate, *though any one of them may sue singly to recover his rights due from other people.*"[1]

"Any one of the trustees may act singly in the follow-matters, *viz.*, in the buying of shrouds, burying the testator, in supplying the food and raiment of his infant children, in returning the deposits with the testator, and paying off his debts and legacies, in the emancipation of his slaves, and *litigating for his rights.*" If there are co-trustees of lands, any one of them may receive the rents though all must join in a conveyance.[2]

[1] Kazi Khan, p. 440.
[2] *Fatâwa-i-Sirâjya ;* Jarman on Wills, II. p. 432.

CHAPTER XVI.

THE LAW RELATING TO WILLS.

Preliminary Discourse.

Lecture XIII.

The records that have been handed down to us from antiquity regarding the customs and usages of the pre-Islamite Arabs seem to establish abundantly that testamentary dispositions were not unknown among the pagan tribes of the peninsula. But it is difficult to say from the materials in our possession what were the conditions which regulated the validity or invalidity of wills made by them.

The Rabbinical law which was in force among the Jewish tribes prohibited the testator from depriving his lawful heirs from the succession; it also precluded him from constituting a stranger as an heir. But when a disposition was effectuated by the immediate delivery of possession, the Rabbinical law apparently regarded it as valid. A will could be made either verbally or in writing but, generally speaking, the first mode was considered as the more preferable of the two.

The Koran expressly sanctioned the power[1] of making a testamentary disposition, and regulated the formalities and conditions to which it is subjected.

"Wills," says the Hedâya "are lawful on a favourable construction. *Analogy* would suggest that they are un-

[1] Koran, chap. V, verse 75, Hed. (Eng. Transl.) IV, p. 468.

lawful, because a bequest signifies an endowment with a thing in a way which occasions such endowment to be referred to a time when the property has become void in the proprietor, (*i. e.*, the testator), and as an endowment with reference to a future period (as if a person were to say to another, I constitute you proprietor of this article on the morrow) is unlawful, supposing even that the donor's property in the article still continues to exist at that time, it follows that the suspension of the deed to a period when the property is null and void, (as at the decease of the party,) is *à fortiori* unlawful. The reasons, however, for a more favourable construction in this particular are two-fold ;—First, there is an indispensable necessity that men should have the power of making bequests, for a man, from the delusion of his hopes, is improvident and deficient in practice, but when sickness invades him, he becomes alarmed and afraid of death. At that period, therefore, he stands in need of compensating for his deficiencies by means of his property—and this in such a manner that if he should die of that illness, his objects (namely, compensation for his deficiencies and merit in a future state) may be obtained,—or on the other hand if he should recover that he may apply the said property to his wants—and as these objects are attainable by giving a legal validity to wills, they are therefore ordained to be lawful. Secondly, wills are declared to be lawful in the Koran and the traditions, and all our doctors, moreover, have concurred in this opinion."

The remarks of M. Sautayra on this subject are deserving of special consideration :—

"A will from the Mussulman's point of view is a divine institution, since its exercise is regulated by the Koran. It offers to the testator the means of correcting to a certain extent the law of succession, and of enabling some

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of those relatives who are excluded from inheritance to obtain a share in his goods, and of recognizing the services rendered to him by a stranger, or the devotion to him in his last moments. At the same time the Prophet has declared that the power should not be exercised to the injury of the lawful heirs."

"The tradition reported by Abi Vekass supports the above view and forms the foundation for the restriction which the Mahommedan Law imposes on the power of testamentary disposition possessed by a Mussulman. He says that 'In the year of the conquest of Mecca, being taken so extremely ill that my life was despaired of, the Prophet of God came to pay me a visit of consolation, I told him that by the blessing of God having a greater estate but no heirs except one daughter, I wished to know if I might dispose of it all by will.' He replied; 'No.' And when I severally interrogated him, 'if I might leave two-thirds or one-half, he alse replied in the negative—but when I asked if I might leave a third, he answered, 'Yes, you may leave a third of your property by will, but a third part to be disposed of by will is a great portion, and it is better you should leave your heirs rich than in a state of poverty which might oblige them to beg of others.'"

The result of these directions is, that under the Islamic law, a testator cannot by a testamentary disposition deprive his lawful heirs of their share in the inheritance nor dispose of more than one-third of his estate.[1] A bequest to an heir is under no circumstance valid, though a bequest in favour of a non-heir is valid to the amount of the third of the estate of the testator, although the heirs of the testator may not give their assent thereto. These

[1] Tirmizi, Ibn Maja, Radd-ul-Muhtâr, V, p. 639.

principles, however, will be developed fully in their proper place.

Having so far pointed out the basis on which the Mahommedan law relating to wills is founded I shall now proceed to discuss what is the definition of a will under the law of Islam, and the conditions requisite for making a valid testamentary disposition, or giving a valid testamentary direction; in other words, the testamentary capacity of the person making a will.

SECTION I.

FORM AND CHARACTERISTICS OF A WILL OR WASIUT.

A will is defined by Jarman to be "an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life."[1] Under the Mahommedan law, however, a will may be made either verbally or in writing.[2] And consequently a *wasiut* is defined in the Alamgiri "to be the *conferment* of a right of property in a specific thing or in a profit or advantage in the manner of a gratuity to take effect on the death of the testator."[3]

The Sharâya defines *wasiut* somewhat similarly, namely, as the act of conferring a right in the substance or a usufruct of a thing after death.

It may be constituted by the use of any expression that sufficiently indicates the intention of the testator; so

[1] Jarman on Wills, p. 16.

[2] A written will is termed a *wasiutnamah*, while a nuncupative will is called simply a *wasiut*. A will need not, under the Mahommedan law, be in writing, *Tumeez Begum* v. *Furihut Hassan*, 2 N. W. P. R. p. 155.

[3] Compare also Radd-ul-Muhtâr, V, p. 640.

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long as it is apparent that the intention of the testator is to make a disposition operative on his death, it will be regarded as a *wasiut*. The devise may be either to the legatee beneficially or in trust for some purpose or object, and may be constituted, by saying, "I have bequeathed such a thing to such an one,"[1] or "I have bequeathed towards such an one," or by any other words or expression that convey the idea of a disposition dependant for its operation upon the death of the testator.

A will may be made also by signs, as in the case of a dumb person who does not possess the faculty of speech but who can express his meaning by signs. So also in the case of a person who is a *mariz*, that is, suffering from a mortal illness and unable from weakness to speak.[2] "A sick man makes a bequest, and being unable to speak from weakness, gives a nod with his head, and it is known *that he comprehends what he is about*; in these circumstances, if his meaning be understood, the bequest is lawful but not otherwise. And it is implied that he dies without regaining the power of speech; for then it is evident that there was no hope at the time of the bequest of his being able to speak, and his condition was therefore the same as that of a dumb man."[3]

In some cases the disposition may *primâ facie* appear to convey an immediate interest, and yet the intention may not be to give it operation during the lifetime of the testator; when that is so, the disposition will take effect as a *wasiut*. Mere postponement of the actual enjoyment of a property conveyed to a person does not necessarily

[1] The difference between the two expressions arises from the use of the two propositions "towards" (*ilâ*) and "to" (*le*) the first signifying the conveyance of a beneficial interest to the legatee and the second by way of trust.

[2] Radd-ul-Muhtar, V, p. 636.

[3] Baillie, p. 652; Alamgiri, VI, p. 168.

constitute the disposition testamentary, as appeared in the case of *Nawab Amjad Ally Khan* v. *Mohamdi Begum.*[1] The character of the disposition, whether it is a will or a disposition *inter vivos*, whether it operates *in præsenti* or *in futuro* as a *wasiut*, is dependant upon the intention of the testator.

Contingent *wasiut*.

A *wasiut* may be conditional or contingent. Its operation will therefore be dependent upon the happening of the contingency, and if the contingency does not happen, it will not be given effect to.[2] A reference to some impending danger is common to most of these cases. For example, a man may say, "should I die of such a malady," or "should I not return from the pilgrimage to the Holy Shrine I leave, &c.," or "I bequeath so and so in case anything happen to me on my voyage to Mecca," the *wasiuts* in these cases would not take effect if the contingencies apprehended do not happen whether the will be in writing or by word. The jurisconsults, however, draw a distinction between a contingent *wasiut* in writing and one made verbally. They hold that when there is only a verbal *wasiut* dependent for its operation on the happening of a contingency which does not happen, the *wasiut* is revoked *ipso facto*. But if the wish of the testator has been reduced into writing, and that writing has been confided into the hands of a third person, and after the possibility of the contingency ever happening has ceased, if the testator does not withdraw the writing from the hands of such person, it will be presumed that he did not intend to revoke his *wasiut* made before, and effect will be given to it. If the will always remained in the hands of the testator no such presumption would arise. But when the

[1] 11 Moore's I. A. p. 517.

[2] And it will not be admitted to probate, 1 Jarman, p. 16, *Parsons* v. *Lance*, 1 Ves. 190 ; *Sinclair* v. *Home*, 6 Ves. 607.

wasiut is in the following terms "should I die," or "if I die, such a thing," or "so much of my inheritance shall belong to such an one," it will not be a contingent will but a *wasiut*, pure and simple, because it is the essence of a *wasiut* that it should take effect upon the death of the testator.[1]

SECTION II.

THE CAPACITY OF TESTATORS.

The capacity of testators.

Freedom.

There is considerable difference between the several schools regarding the capacity to make a will. Freedom, however, is regarded by all the schools as a necessary condition. A slave, whether in the absolute control of his master, or one[2] who has obtained a qualified freedom upon a covenant for ransom cannot make a testamentary disposition of his property. But a bequest made by a person labouring under this disability would be valid when its operation is referred to a time subsequent to his attaining his freedom.[3] A prisoner incarcerated for an offence is not subject to this disability, for he is not debarred by his loss of freedom under the direction of the law, from dealing with his property, as his conviction of the offence does not vest the property in anybody else, whereas the slave, whether absolute or qualified, can only hold property subject to the control of his master.

Sanity.

Sanity also is a necessary condition to the validity of a *wasiut*. "A bequest," says the Fatâwa-i-Alamgiri, "by any one who is incompetent to perform a gratuitous act is null. Hence bequest by an insane person or a *mokâ-*

[1] Santayra, p. 341.

[2] Example of this will be given later.

[3] A mokâtib.

tib[1] or a *mâzoon*[2] is void. And if a person is insane at the time of making a *wasiut*, but afterwards recovers from his insanity and then dies, still the bequest is unlawful for want of competency at the time of making it."

According to the English law, a will made during a lucid interval is valid. In other words, though the fact of a person being found insane is *primâ facie* evidence of habitual insanity, and consequently of the invalidity of the will, yet it does not preclude proof that the execution occurred during a lucid interval. The principle of the Mahommedan law is apparently different,—for, according to Kazi Khan, if a person makes a *wasiut* and subsequent thereto becomes a permanent lunatic, in such a case the *wasiut* will become void. But when the madness has not lasted over six months, the bequest will not be voided.

The law requires a perfectly disposing mind, and a person who becomes mad shortly after making a bequest, or who is mad at the time, is presumed not to be capable of exercising the faculty of properly considering the nature of the act. Similarly, if a person were to make a bequest, and then become subject to hallucinations and afterwards lose his mind, and remain in that condition until his death, the *wasiut* will be void.[3] It would follow from the above *dictum* that when a person is a lunatic, and makes a bequest during a state of lucidity, the bequest would be invalid, for the reasons upon which the *wasiut* of a person who loses his mind after the bequest, is held to be void. Is perfect sanity, however, an essential condition?

[1] A slave who has entered into an agreement with his master for his ransom or emancipation.

[2] Licensed slave—a slave who has obtained licence to work for himself.

[3] Radd-ul-Muhtâr, V, p. 651.

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The Sharâya speaks of "perfect understanding" as necessary to the valid constitution of a will; but it would seem from the cases given in the Jâma-ush-Shattât and the general purport of the Hanafi law, that what is required is a mind that comprehends the nature of the testamentary act, in other words, it must be a disposing mind. As long as the capacity to understand the nature of the act is present, as long as the person entering into the obligation is possessed of understanding, sufficient to comprehend the effect of the disposition, the mere existence of partial delusions would not destroy the capacity to make a will.[1] As a general rule, it may be stated that the principles of the Mahommedan law with regard to the disposing capacity of persons afflicted with any mental delusion on any particular subject, which however does not interfere with their powers of comprehension, are analogous in the main to the principles recognized by the English law.

Absolute insanity may not be the only cause of destroying the disposing capacity. The will of an idiot is of course void. Mental imbecility arising from advanced age, illness, or any other cause may destroy the testamentary power. The loss of the disposing capacity may be either temporary or permanent. A temporary loss may be caused by drinking, drugging, illness, &c. Undue influence exercised over a weak mind may also lead to the same effect.

Under the Mahommedan Law, the acts of disposition by a person suffering from an illness which induces the apprehension of death and which eventually causes death, have only a qualified effect given to them. For example, when a person suffering from such an illness makes a gift or *wakf*, such disposition, though an act of

[1] See the case of *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549.

immediate operation, takes effect like a will and is valid only so far as a *wasiut* may be valid.[1]

This is independently of any question regarding the disposing condition of the testator's mind or the spontaneity of his action. The law presumes that a person in such a state is devoid of a complete disposing faculty. In considering, therefore, the operative character of voluntary dispositions to which effect is given immediately, regard is to be had to the state of the disposing party at the time of the contract. If he was then in health, they are valid as against the whole of his property, and if he was not then in health, they are valid as against a third of it. By acts of disposal are to be understood such acts as are initiatory or creative of right, and have in them something gratuitous. For the acknowledgment of a debt in sickness operates against the whole of a person's estate, and a marriage contracted in sickness is in like manner operative against the whole to the extent of the proper dower. An act of disposal which is not to take effect till after the death of the disposing party, as when a man says—"Thou art free after my death," or "This is to Zaid after my death," is good only to the extent of a third of his property even though it were made in health. Emancipation, *muhâbât*,[2] *wakf*, gift and *ziman* or suretyship by a sick man have all the same effect as bequests, and operate only against a third of his property.[3] The diseases which naturally give rise to an apprehension of death and which are technically called *Marz-ul-maut* or *death-illness* have been explained in a previous

[1] The will of a person suffering from a *Marz-ul-Maut* is valid only as to a third. Radd-ul-Muhtâr.

[2] *Muhâbât* is an act by which the donor makes a gratuity to the donee either by reducing the price or increasing the value of the property sold. *Muhâbât* is derived from *hubwat*.

[3] Alamgiri, VI, p. 168. Baillie, p. 651.

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chapter. Some further explanations may usefully be added here.[1]

Marz-ul-maut (Hanafi doctrines).

"The approved doctrine as stated by Kahastâni is that *Marz-ul-maut* is an illness from which death results though the sufferer be not confined to his bed. A long-standing illness is not regarded as a death-illness so as to overpower the disposing faculty of the sufferer and restrict his capacity to make a disposition of his entire estate, on the ground that when it has existed for a long period, it has become a part of his nature as in the case of the blind, the lame, &c. A death-illness is accordingly a disease from which death is imminent, and this happens when it goes on increasing until it ends in death, but where it remains stationary for a long time, or the progress is so imperceptible as to cause no fear to the sufferer, when he becomes habituated to it, it is not death-illness.[2] When a death occurs after the lapse of a full twelvemonth from the commencement of the disease, the disposition is valid with reference to the entire estate. But when a death has occurred before that period from a disease which usually ends fatally, and the diseased was disabled by it from leaving his house to attend to his ordinary avocations or, if a woman, from performing domestic duties in the house, such a disease is regarded as death-illness and the disposition will take effect with reference to one-third." "A gratuitous disposition by a woman about to be confined is valid with reference to one-third; so also if two bodies of men come into collision with each other which ends in bloodshed and the death of some, the rule of *Marz-ul-maut* would apply, (*i. e.*, the disposition made after the people had started for the fight would only take effect with reference to a third, but not if there was no collision).

[1] From the Chapter on Wills, Radd-ul-Muhtar, V, p. 639.

[2] This is according to Zailye and others.

So also the disposition of a person overwhelmed in a storm and of the prisoner ordered to be executed."[1] The provisions of the Shiah law on this branch of the subject are analogous and yet there are some features of difference which deserve especial attention. According to the Jawâhir-ul-Kalâm, "dispositions of property by a person suffering from a mortal-illness are of two kinds:—such as are deferred and not intended to have operation until after the death of the testator; and such as take effect immediately. The first are to be treated in every respect as legacies according to the unanimous consent of 'our' doctors and like the acts of a person in health which are done with reference to his death so as not to take effect till after it. The second description of acts are such as are of immediate operation like *muhâbât* or connivance at loss in contracts of exchange and gift, appropriation and emancipation. These are good according to some of 'our' doctors as against the whole of the settlor's property, and according to others only as against a third. Both opinions, however, agree in this that if he should recover from his sickness they are valid against himself and against his heirs, and the difference of opinion is only when he dies of the same disease."

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Shiah doctrines.

"Here it is necessary to note the diseases which restrain a man from disposing of more than a third of his property. Upon this point we may say that every disease which is usually accompanied with apprehension of death is said to be dangerous,[2] such as hectic fever, consumption, hœmorrhage, &c. Diseases again from which there is usually recovery have no other effect on a man's disposal of his property than if he were in a state of health such as temporary fever, headache, whether

[1] Radd-ul-Muhtar, V, p. 650, according to the *Mirâj*.

[2] Querry, Droit Musalman, I, p. 635.

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with continued augmentation or not, ophthalmia, and a tubercle on the tongue. Diseases again which admit of being classed as either, that is, as *dangerous* and *undangerous* are putrid fever, diarrhœa, a phlegmatic swelling. It were, however, better to ascribe the effect under consideration to all diseases which are in fact accompanied with, or terminate in death, whether they are customarily dangerous or not. *But occasions of actual conflict in war, or of childbirth with women, or of storms at sea have not the effect alluded to, namely, that of impairing a person's power to dispose of his property because in point of fact the term disease is quite inapplicable* to them."[1]

The effect of testamentary dispositions by a person labouring under an illness of which he eventually dies, is thus explained in the Sharâya :—

(*a.*) When a person in sickness has made a gift and also entered into a *muhâbât* transaction, and the third of his property suffices for both purposes, there is no question that effect is to be given to both. But if it should fall short, the first act of the deceased is entitled to preference, and effect would be given to the other acts in succession until the third is exhausted when the deficiency would fall solely upon the last. (*b.*) When a gift of immediate operation and one whose effect is postponed or suspended are made at the same time, preference is to be given to the former, but effect will also be given to the latter if the third of the estate is sufficient for both purposes, but if not, the latter is valid so far as the third will bear and void as to the remainder. (*c.*) When a sick person having no more than a *kurr* (measure) of grain of some kind of the value of six dinars sells it for a *kurr* of inferior grain of the value of two dinars the loss by the *muhâbât* is a half of his whole estate whereas all that

[1] On this point the Hanafis differ.

he can lawfully dispose of is no more than a third and the purchaser should accordingly restore a sixth to the heirs, but that would be usurious, and in order to make a valid transaction it is necessary that he should give back to the heirs one-third of their good *kurr*, and that they should give back to him one-third of his inferior *kurr*; there will thus remain with the heirs two-thirds of the *kurr*, or two dinars in value, and with the purchaser two-thirds of a *kurr* or four dinars in value, which will only be an excess of two dinars or one-third of six (the whole estate) which is just the amount which the seller could lawfully dispose of in his last illness."

"Fourth. If a sick person should sell some article of the value of two hundred for one hundred and afterwards recover of his disease, the contract is necessarily binding. But if he should die, and the heirs refuse to ratify the sale, it would be valid so far as a half of the article is opposed to what he actually paid, and that is three parts out of six and the *muhâbât* is good as to two-sixths or one-third of the six, and these together, amount to five-sixths of the article to which extent then the sale is valid, and void only as to the remaining one-sixth which therefore must be returned to the heirs. The purchaser, however, has an option and may cancel the sale on account of the partial invalidity of the bargain or abide by it, but should he adopt the latter alternative and offer the heirs a compensation for a sixth of the article, they also have an option either to reject or accept, their right being involved in the substance of the article."

The result of these provisions is, that a testamentary disposition by a person suffering from a death-illness is valid, if at the time of the *wasiut*, the testator was sufficiently in his senses, and the act was a spontaneous ex-

pression of his own wish or intention. An act of immediate operation even would take effect as a *wasiut*.

There is considerable difference, however, between a gratuitous disposition made on a death-bed or in contemplation of death, and the acknowledgment of a liability.

"It is to be observed as a general rule," says the Hedâya, "that where a person performs with his property any gratuitous deed of immediate operation, (that is, not restricted to his death,) if he be in health at the time, such deed is valid to the extent of all his property—or, if he be sick, it takes effect to the extent of one-third of his property, and where a person performs such deed with his property restricted to the circumstance of his decease, it takes effect to the extent of a third of his property, whether at the time he be sick or in health. If on the contrary a person make an acknowledgment of debt, such acknowledgment is of effect to the whole extent of his property, notwithstanding it be made during sickness as this is not a *gratuitous* deed. Still, however, a declaration of this nature made in health precedes a declaration of the same nature made in sickness. It is also to be remarked that a sickness of which a person afterwards recovers, is considered in law as health."

"If a sick person make an acknowledgment of debt in favour of a strange woman, or make a bequest in her favour, or bestow a gift upon her and afterwards marry her and then die, the acknowledgment is valid, but the bequest or gift is void; for the nullity of an acknowledgment in favour of an heir depends on the person having been an heir at the time of making it; whereas the nullity of a bequest in favour of an heir depends on the legatee being so at the time of the testator's death as has been already explained, and as the woman was not an heir at the time of the acknowledgment but had become so (by

marriage) at the time of the testator's death, the acknowledgment is therefore valid, but the bequest is void, and so likewise the gift, it being subject to the same rule as the bequest."

"If a sick person make an acknowledgment of debt due by him to his son, or make a bequest in his favour, or bestow a gift upon him at a time when the son was a Christian, and he (the son) afterwards previous to his father's death became a Mussalman, all those deeds of acknowledgment, gift or bequest are void; the bequest and the gift, because of the son being an heir at the death of his father as above explained, and the acknowledgment, because, although the son on account of the bar (namely, difference of religion) was not an heir at the time of making it, still the cause of inheritance (namely, consanguinity) did then exist, which throws an imputation on the father as it engenders a suspicion that he may have made a false declaration in order to secure the descent of part of his fortune to his son. It is different in the case of marriage as above stated, for there the cause of inheritance, (namely, marriage) occurred posterior to the acknowledgment and had no existence previous thereto, for supposing the marriage to have existed at the period of making the acknowledgment, and that the wife being then a Christian, should afterwards, before the husband's death, become a Mussulman, in that case it (the acknowledgment) would not be valid."

"If a sick person make an acknowledgment of debt due by him to his son who is an absolute slave or *mokâtib*, or bestow a gift upon him, or make a bequest in his favour, and the son should afterwards, before the death of his father, obtain his liberty, in that case none of these deeds are valid, because of the reasons explained in the preceding example."

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Similarly Kazi Khan declares, "When a sick man has acknowledged a debt to a woman who is a stranger to him, or bequeathed a legacy to her, or made her a gift and has subsequently married her and then died, the acknowledgment is lawful according to 'us' but the legacy and the gift are void. And when a sick man has made a bequest to his son who is an infidel, or a slave, or has made a gift to him with delivery, or acknowledged a debt to him, and the son is then converted to the faith, or is emancipated before his death the whole of his act is void."

But when the acknowledgment is not for a specific amount, or for a specific thing, it will be given effect to from the one-third of the estate. For example, if a person were to say to his heirs on his death-bed, "I am indebted to Zaid, and you must credit what he says," in that case the claim of Zaid to any amount not exceeding a third of the estate must be admitted, although the heirs should claim it. This proceeds upon the basis of a favourable construction.[1]

Similarly if the testator were to say to his heirs, "if Zaid come and claim anything from you on my behalf, pay him the same to whatever amount," which declaration would be recognized and complied with to the amount of one-third of the estate, and the acknowledgment being thus equivalent to a bequest, the declaration of Zaid must be credited to the amount of one-third of the acknowledgor's estate and no more. If, therefore, besides the acknowledgment in question, the testator had made various bequests in favour of others, one-third of his estate must be set apart for the legatees and two-thirds for the heirs. And the heirs and legatees will be called upon to declare if the testator said anything to Zaid, and if they admit any liability, it will be discharged out of the estate

[1] Hedaya IV, p. 494.

and effects of the acknowledgor in proportion to the respective shares of the heirs and the legatees must be required to verify the declaration to Zaid to such extent as they may think proper." Now if both parties acknowledge that there is something owing to Zaid, it is evident that there rests a debt upon the estate affecting the shares of each respectively and consequently this being so, it follows that if Zaid should claim more than what is admitted by the heirs and legatees, [and has no other proof, excepting the unspecific acknowledgment of the testator,] the affirmation on oath of the heirs and legatees, "to the best of their knowledge, or in other words to the effect that they do not know of any more being due to Zaid" will be believed: "for they cannot be required to swear positively, as their oath regards a matter between the claimant and the acknowledgor merely, and in which they are not principals."

If a person bequeath any article jointly to one of his heirs and a stranger, in this case the bequest in favour of the heir is not admitted and a moiety only of the legacy is given to the stranger because as an heir possesses the capacity of being a legatee he therefore obstructs the stranger in the title which he would otherwise have to the complete legacy. It is not so when a legacy is left between one person living and another dead, for here the whole goes to the living legatee since a dead person cannot take a bequest.

The capacity of an infant.

Shiah Law.

Regarding the capacity of an infant to make a testamentary disposition, the divergence between the schools is very great. The Shiah law declares that perfect intellect and freedom are indispensably requisite to the validity of a bequest, and the will of a *majnun*[1] and of a *sabi* (youth or child) under ten years of age is not valid;

[1] Sharâya, p. 247.

when he has attained to that age all bequests by him for proper purposes in favour of his relatives and others are lawful according to the most common and approved doctrine, *if he is capable of discernment.*

Shâfeï and Mâliki doctrines.

The Shâfeïs and Mâlikis agree generally with the Shiahs. According to the Shâfeï doctrines an infant may validly constitute a *wasiut* if he is morally in a condition to understand the nature of his act.[1] In other words, there is no hard and fast rule as to the limit of age where capacity would be presumed. The Mâlikis also do not regard infancy in itself a disability, but the jurists of this school do not seem to be agreed as to the characteristics of a *wasiut* made by an infant. Whilst some of them hold that only such dispositions by a minor should be regarded as valid as are in favour of pious objects, others are of opinion that the right of a minor to make a *wasiut* should not be restricted to these objects alone, but should be extended to all dispositions when it appears that they are not contradictory and the minor possesses the comprehension to understand the nature of his act.

Hanafi doctrines.

The Hanafis, on the other hand, consider an infant who has not attained puberty as wanting in reason or comprehension and refuse him the power of making a *wasiut*. The Multeka expressly declares "that the validity of a *wasiut* requires several conditions, one of them being that the testator should be adult." So also the Fatâwa-i-Alamgiri; "a bequest by a youth under puberty whether he be a *murâhik*[2] (adolescent) or not is unlawful according to us. And it makes no difference whether the youth be permitted to trade or be under inhibition, or whether he die before or after puberty. So also, though he should say, 'If I arrive at majority a third of my property is to such an one,' the *wasiut* is not

[1] Sautayra, p. 319.

[2] One approaching puberty.

valid for want of competency at the time of making it." According to the Radd-ul-Muhtâr, "the *wasiut* of a minor though possessed of discernment, is not valid, except with respect to the provision for his funeral expenses, (on the authority of Omar [may God be pleased with him] in the matter of a *wasiut* of an adolescent)." The Hedâya points out the difference between the Hanafi and Shâfeï law in some detail. "Bequest by an infant is not valid. Shafeï maintains that it is valid, provided it be made to a discreet and advisable purpose, because Omar confirmed the will of a *sabi* (that is a boy who has nearly reached the age of maturity), and also because in the execution of it a degree of advantage results to the infant inasmuch as he acquires the merit of the deed—whereas in the annulment of it he is deprived of all advantage. The arguments of our doctors in support of their opinion upon this point are two-fold. First, a will is a voluntary act concerning which an infant has not a capacity of forming a proper judgment. Secondly, the declaration of an infant is not of a binding nature, but if the validity of a bequest by such were admitted that effect would follow of course. With regard to the tradition of Omar, the term *sabi* there used must be understood to mean a person just arrived at the age of maturity, or 'the will of the *sabi*' relates merely to the celebration of the obsequies which is lawful in the opinion of our doctors. Besides the annulment of the will is advantageous to the infant, since in allowing his property to pass to the heirs, the rights of natural affection are maintained as before mentioned. With respect to the assertion of Shâfeï that in the execution of the will an advantage results to the infant, it may be replied that the point to be attended to in cases of advantage or loss is the immediate tendency of any

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act or deed, and not what may eventually result from it; in other words, if the deed itself in its immediate tendency produce advantage, the execution of it on account of the infant is preferable, but in the case here considered the deed (that is, the bequest) in its immediate tendency leads to a loss of property although eventually the infant have an advantage, the bequest having been made with a view to obtain merit in the eye of God, and since the bequest of the infant in its immediate tendency occasions a loss it is not valid; in the same manner as holds in case of a divorce, in other words, if an infant divorce his wife or his guardian do so on his behalf, it is not binding notwithstanding a divorce may on many occasions be attended with advantage, as where an infant having a wife who is poor wishes to divorce her and marry her sister who is rich and handsome. In short, bequest by an infant is invalid according to our doctors, and in the same manner if an infant should make a will and die after he had attained to maturity the will is not valid as having been made at a time when he was unqualified for such an act and so likewise if an infant should say, 'It is my will whenever I reach the age of maturity that a third of my estate be considered as a legacy in favour of a particular person,' the will is not valid because an infant being unqualified is not competent to make a will that shall be deemed valid immediately, or that can be rendered so by being suspended to a future period, in the same manner as he is incapable of divorce or emancipation.[1] It is otherwise with respect to a slave or a *mokâtib* for they possess a complete competency obstructed merely by the right of their master and therefore all their acts (such as divorce, bequest or so forth) are perfectly valid if referred to a period when that bar no longer exists, as

[1] Comp. the Radd-ul-Muhtâr, V, p. 645.

where a slave (for instance) says, 'I declare my wife to be divorced whenever I am free.'"

The provisions of the Hanafi law amount to this that an infant *under the age of puberty* does not possess the capacity of making a disposition of his property by will. What would be the limit of age under the Indian Majority Act (Act IX of 1875) is a question which has been considered at some length at a previous stage of these lectures.[1] But a *wasiut* made by a minor becomes effective *ab initio* upon his confirming or ratifying the same after attaining majority.[2]

As regards the capacity of a person who is condemned to death for an offence, there is no provision in the law to deprive him of the power of making a will. A soldier engaged in an expedition, a person travelling and away from his property, in fact every sane and free person whether man or woman can validly make a bequest.

Difference of creed is no objection to the power of devising by will. The Multeka lays this down expressly; "the difference of religion between the testator and the legatee is no ground for impugning the lawfulness of a *wasiut*. Accordingly a Mussulman can make a disposition in favour of a non-Moslem (unless he is an alien) as a non-Moslem can make one in favour of a Mussulman."[3] With regard to the validity of a will made by a Moslem who afterwards apostatizes there seems to be some divergence between the schools. According to the Mâlikis the *wasiut* is annulled by the fact of apostacy. According to the Hanafis the will would have effect given to it if it is valid according to the sect to which be has apostatized.[4]

"If a Moslem should apostatize to Christianity, Judaism or Magianism and then make some of the bequests refer-

[1] See *ante*, p. 48.
[2] Fatâwa-i-Alamgiri.
[3] The Shâfeïs differ.
[4] Baillie, p. 675.

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red to, such of them as would be valid if made by a Moslem remain in suspense until he returns to the faith or is put to death, or dies naturally, or takes refuge in a foreign country, and such of them as are not valid if made by a Moslem are void according to Abû Hanifa; but according to the two disciples, the acts of an apostate are operative for the present, so that whatever is valid according to the sect to which he apostatizes is valid in him, and if the bequest be an act of piety with *them* but sin with 'us,' it is valid though to a set of persons who are not particularized. With regard to a female apostate, her bequests are valid so far as the bequests of the sect to which she has apostatized would be valid, because she is not liable to be put to death for her apostacy."[1]

Another essential requisite to the validity of a testamentary disposition is that the testator should be proprietor of the subject of the will or should be entitled to it when it happens to be a right.[2]

But when the subject of the bequest is the property of the testator who is so burdened with debt that his liabilities exceed his assets, the disposition will not have effect given to it unless the creditors discharge the estate from the payment of their debts.[3]

[1] Alamgiri, VI, p. 141; Baillie, p. 675; Radd-ul-Muhtâr, V, p. 643; Hedâya, IV, p 537.

[2] Santayra, p. 321.

[3] In the Alamgiri this principle is stated as follows:—"When a man makes a bequest, being in debt to the full amount of all his property, the bequest is not lawful, unless the creditors agree to release the property *pro tanto*." It will be observed that the way in which the principle is stated here is in its effects somewhat different from the principle as given in the text. And the English version of the Hedâya accentuates the difference in the following passage; "if a person," it says, "deeply involved, bequeathes any legacies, such bequest is unlawful and of no effect, because debts have a preference to bequests, and the discharge of debts is an absolute duty, whereas bequests are gratuitous and voluntary, and that which is most indispensable must be first considered. If, however,

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The Shiah doctrines on this point are explained thus in the Sharâya :[1]—" When a person who is in debt directs by will the emancipation of his slave[2] and the value of the slave is twice the amount of the debt, the slave is emancipated but must labour for five-sixths of his value, but if the value of the slave is less than the debt the legacy is valid. The reason is that debts taking precedence of legacies must be first discharged, and it is only out of a third of what remains of the estate that the emancipation can take effect. It is otherwise in the case of a gratuitous emancipation by a master on his death-bed when the law is as before mentioned on the ground of an express decision recorded by Abdur Rahmân as coming from the Imam Jâfer Sâdik on whom be peace."

A *wasiut* is lawful for any purpose which is considered proper under the law and which may be carried into effect at the time of the testator's decease. The principles, however, are subject to certain limitations, the consideration of which is necessary before we come to the discussion of the persons for whom a *wusiut* may validly be constituted.

Bequest to a slayer invalid.

(1) A *wasiut* in favour of a person who intentionally causes the death of the testator is unlawful according to all the schools. According to the Hanafis, a bequest is not lawful to a person who causes the death of the testator even unintentionally, by accident or misadventure

the creditors of the deceased relinquish their claims, the bequest is then valid, the obstacle to it being removed, and the legatee being supposed to stand in need of his legacy." But an analysis of the expressions used in all the texts shows clearly that the dicta refer to the invalidity of testamentary dispositions by persons whose debts leave no margin for the payment of legacies, and who, to use the Arabian phraseology, are "drowned in debt."

[1] Jawâhir-ul-Kalâm ; Sharâya.

[2] The illustration is somewhat characteristic of the modes of thought prevailing at this time, but it seems to explain fully the meaning.

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unless the person causing the death is an infant or insane.[1] According to the Hanafis the bequest is unlawful whether it was made before or after the death-wound. But if the heirs assent to the bequest it would be valid according to Abû Hanifa and Mohammed, though not according to Abû Yusuf. When the death is caused by an infant or a lunatic legatee, the assent of the heirs is not necessary to the validity of the bequest. "The Prophet has declared," says the Radd-ul-Muhtâr, "there is no legacy for the person slaying, for he has hastened an event which God might have delayed, and therefore a bequest to the murderer is unlawful whether it was made before the mortal wound was given or subsequently for the tradition is general and this is the view of Zailye. By hastening the event is meant that the act of the murderer is the immediate cause of the death of the deceased, for otherwise, as held by the followers of the true doctrine, the death is an event which was inevitable." "If a person simply wounds another, but the actual slaying is done by a third person, the legacy to the person wounding is not invalid, for he is not the murderer, this is the view of Waluljih. The person causing the death of another forfeits the legacy whether his act was intentional, or the result of accident, or misadventure, for example, if a man digs a wall and the person who has left him a legacy falls into it, the legatee forfeits the legacy."

"A bequest to a slayer will be valid according to Abû Hanifa and Mohammed if the heirs of the testator should consent. Abû Yusuf, however, disagrees on this point, and holds that it is absolutely void though the heirs should consent. According to Sharniblalieh, a bequest made be-

[1] "This exception in favour of an infant and a lunatic is made," says the Radd-ul-Muhtâr, "because they are not liable to punishment."

fore the murder is void according to all of them though the heirs should consent."[1]

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According to the Mâlikis the testator has the power of condoning the offence committed on his person, and if after receiving the mortal wound he makes a *wasiut* in favour of the person causing the wound it will be presumed that he pardoned the offence and the bequest would be valid.

According to the Shiahs, the homicide must be intentional to avoid the legacy to the person causing the death. According to the Hanafi law if the person causing the death is the only heir of the testator, the bequest to him would be lawful according to Abû Hanifa and Mohammed, though not according to Abû Yusuf.

But though a legacy to one's murderer or homicide is unlawful, a bequest in favour of his parents, children or any other ascendants or descendants would be lawful.

Bequest to an heir.

(2) According to all the schools a bequest to any one of the heirs is invalid without the consent of the others.

[1] "A bequest," says the Alamgari, "to a person who slays the testator either intentionally or by accident is not lawful whether the bequest were made before the death-wound or after it. But if the heirs assent to the bequest it is lawful according to Abû Hanifa and Mohammed. And if the slayer be a youth under puberty or insane the bequest to him is lawful without the consent of the heirs, or if the slayer be himself the sole heir a bequest to him is lawful according to Abû Hanifa and Mohammed. A bequest to the *mokâtib* or *mudubbur* or *umm-i-walad* of the slayer is also unlawful without the consent of the heirs."

The Hedâya states as follows:—"If a person makes a bequest in favour of another from whom he has received a mortal wound, it is not valid whether the murderer be one of his heirs or a stranger, or whether he may have wounded him wilfully or by misadvanture provided he be the actual perpetrator of the deed because it is recorded in the traditions that there is no legacy for a murderer, and also as the person who gave the wound has hastened the death of the testator, he is by way of punishment excluded from the benefit of the will in the same manner as a person under similar circumstances is excluded from inheritance. So likewise where a man having made a bequest in favour of a particular person is after-

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"A bequest" says the Radd-ul-Muhtâr "to a stranger (or non-heir) is valid to the extent of one-third of the testator's estate, but it may be validated respecting a larger proportion with the assent of the heirs after the death of the testator; consent given during the lifetime of the testator is of no effect; the consent in order to be effectual must be not only after the death of the testator, but the parties must be adult and *sui juris*. The consent of heirs before the death of the testator is ineffectual because the right to the inheritance does not vest in them until his death. When consent is given according to "us," the legatee would derive his title from the testator; according to Shâfeï, the right will be derived from the consenting heir. When some of the heirs consent and others do not, the legacy will be valid in proportion to the share of the assenting heirs. It is requisite that the consenting heirs should be adult and possessed of understanding, that is, sane. Consequently the consent of the infant and the insane is not valid. The consent of the person who is sick is subject to the same rules as his legacy. Whether a person is an heir or not must be considered with reference to his right of inheritance at the time of the testator's death. Therefore, when a person leaves a legacy to his brother at a time when he has no children, and afterwards children are born to him and he dies, the legacy to the brother is valid, for in the presence of the children he has no right of inheritance. Similarly, if a person makes a bequest for his wife and afterwards divorces her, the legacy would be valid for she is not an heir

wards killed by that person, such bequest is invalid. If, however, in these cases the heirs should give their consent the bequest then becomes valid according to Abû Hanifa and Mohammed. Abû Yusuf is of a contrary opinion because the offence of the murderer which is the cause of the invalidity of the will still exists." The former view is the one generally accepted by the sect.

at the time of the testator's death; the marriage relation having been dissolved, the right of inheritance also falls to the ground." [1]

If the heir is sane and adult and therefore possessed of the capacity of disposition but happens to give his consent at a time when he is suffering from illness, if he recovers from that illness, his consent is valid. But if he dies of the illness, his assent will have the same effect as if it was a bequest, so that if the original legatee was an heir of the assenting heir, the assent is not lawful unless concurred in by the other heirs of the sick person, but if the original legatee was not the heir of the assenting heir who has died, the assent will validate the legacy to the extent of one-third of his share in the inheritance of the original testator.[2]

But though a bequest in favour of an heir is invalid, an *ikrar* or acknowledgment of a debt as stated before is valid.[3]

If a man makes a bequest in favour of a part of his heirs, it is not valid because of a traditional saying of the prophet, "God has allotted to every heir his particular right," and also because a will in favour of a part of the heirs is an injury to the rest, and therefore if it were deemed legal, it would induce a breach of the ties of kindred. Besides it is said in the traditions "a bequest to particular heirs is unjust." It is to be observed that in judging whether the legatee be an heir or otherwise, regard is paid to the time of the testator's death and not, as pointed out already, to the period of making the will. If some of the heirs should give their consent and part withhold it, the bequest then becomes valid in porportion to

[1] Radd-ul-Muhtâr, V, p. 644.

[2] *Ibid.* Comp. Baillie, p. 626; Alamgiri, V, p. 148.

[3] See *ante*, p. 451; Radd-ul-Muhtâr, V, p. 644; Hedâya, IV, p. 472.

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To recapitulate :—The persons who cannot be excluded from succession by a testamentary disposition are those who are entitled to a share in the inheritance of the testator upon his decease whatever may be the category of their heirship. This principle is founded upon the direction contained in chap. IV, verse 7 of the Koran: "To every one have we appointed kinsfolk as heirs from their parents and relatives, and those with whom we have joined their right hands; so give them their portions, for verily God is over all a witness." The rights of the heirs, say the jurists, are thus irrevocably fixed by the Koran, and the harmony which has been established by the divine law among the different degrees of relations who would be entitled to succession to the estate of a deceased person should not be broken by his leaving a larger share to one heir. The author of the Multeka has declared in consequence that a testamentary disposition is null from the time when the succession opens, when the legatee is an heir, and the Mâliki lawyer, Khalil-ibn-Ishâk, has declared that all legacies to the heirs are void.

In consequence of these directions, the Mussulmans scarcely ever make bequests in favour of an heir. When they intend making any variation in the shares of their heirs, they either make a *hiba* or an acknowledgment of debt in favour of the heir whom they desire to prefer. Occasionally the devise is made nominally in favour of one who is not an heir but really in favour of an heir.

But a bequest in favour of a relation who is not entitled to a share in the inheritance of the testator or who, though an heir at the time of making a devise, is excluded by any circumstance from succession at the time when the inheritance opens, is valid in law; for example, when a

person has two sons and one grandson, the son of a predeceased son to whom he makes a bequest not exceeding one-third of his property, such bequest is valid. Similarly if a man has a son and a daughter's son or a daughter's daughter, the daughter's son, not being an heir, a bequest to him is valid. When a person has only a brother, and no children, the bequest to him would be invalid, but if a child is born to the testator after the bequest it will be valid, provided of course it does not exceed the disposable third. If a man make a *wisiut* in favour of his wife, it would be invalid, but if she is divorced before his death, it would be valid.

A case given by Sautayra will exemplify one branch of these principles. A man of the name of Bou-Medina acknowledged himself to be a debtor of his wife to the extent of 250 dirhems, and subject to the payment of that debt, left all his estate and effects in equal shares to his said wife and two strangers; held under the Mohammedan law that the debt should be first paid out of the estate, and that the estate should be thereafter divided in the following manner among the legatees and heirs,—3/12 to the widow, being 3/12 or 1/4 the share of the widow.

2/12 to each of the legatees, being 1/3 of the quantity disposible
5/12 to the heirs
Total, 12/12.

Bequest to an heir valid with consent of the other heirs.

All the schools agree in holding that a bequest in favour of an heir is invalid. A legacy, says the author of the Multeka, in favour of one heir is valid if the other heirs consent thereto. And the Shâfeï lawyer Abû Khoja has laid down the principle in similar terms, and the Mâliki jurist Khalîl-ibn-Ishâk has declared that where a disposition is made in favour of an heir and ratified by the other

heirs, the legacy would take effect as an act of liberality on their part. According to the Shiah lawyers, as we shall show more fully hereafter, a devise in favour of heirs to the extent of one-third of the estate of the testator is valid without the consent of the other heirs, but where the devise is for more than one-third it is not valid without the consent of all the heirs. Such consent may be given either *before* or *after* the death of the testator. Under the Sunni law ratification must always be *after* the death, an assent before death being of no effect.

Under the Sunni law apparently the assent must be a free and voluntary act on the part of the heirs and accordingly where the testator has held out any threat in his will, the effect of which may be to bias the mind improperly the bequest will not take effect. "A legacy to an heir" says Khalîl-ibn-Ishâk, "would be annulled when the testator has used the following expression, namely, 'If my heirs do not ratify these my dispositions my property shall go to the poor.' But a legacy expressed in the following terms: 'I bequeath such a legacy to the poor unless my heirs consent to give it to my son' is valid because the heirs are free either to give or refuse their consent."

The voluntary assent given by the heirs during the last illness of the testator is irrevocable because the heir is supposed to have then acquired a right.

When a person has no heir he can leave his entire property to any one whom he likes.

Shiah doctrines.

The author of the Sharâya has laid down that when a testator has excluded one of his children from succession and left the property wholly to the others his direction is entirely invalid, and the inheritance will be apportioned among the heirs according to their legal shares. But supposing a father makes an unequal division of property among his

children or other heirs to take effect after his death (a *taksîm-bil-wasiut*) if it is assented to by the heirs it is lawful without question, but if no such assent is given what would be the effect? An example of such a case is given in the Jâma-ush-Shattât. A person who was going on a pilgrimage made a partition of his estate and effects among his children in the following manner :—(*a*) To some he gave some properties in excess of their legal shares on account of the dower due to their mother; (*b*) to others he gave certain sums of money in excess of their shares to defray the expenses of their marriages. A question was raised by the heirs who received smaller shares as to the validity of the *taksim-namah-bil-wasiut*. The *dictum* of the Mujtahid was to the following effect :—

"The dower is a debt which is bound to be discharged before the payment of the legacies. The properties given in lieu thereof have been lawfully devised. The sums of money left to some of the children in excess of their legal shares are in the nature of legacies and must come out of one-third of the testator's estate. The remainder of the property must be divided among the children according to their legal shares."[1]

A bequest in excess of the one-third is valid with the assent of the heirs. When there are sevaral heirs and one or more of them allows the excess it is valid to the extent of his share in it. The assent of an heir is effective when conceded after the testator's death. Whether it is equally valid before his death is a question on which there are two opinions the more common and approved of which is in favour of its being binding on the heir. When the consent is interposed after the testator's death, it is a ratification of his act and not a gift *de novo* from the heir, consequently it does

[1] Jâma-ush-Shattât. Baillie's Imamia Law, p. 233.

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not require possession by the legatee to complete its validity."

(3) A *wasiut* by a Moslem favour of an alien infidel is unlawful in according to all the schools.[1]

(4) Bequest for the following purposes are invalid under the Hanafi law.[2]

If a person should direct by his will that his body after his death should be carried to a certain place and there interred, and that a *rubât* is to be erected at the place, Abul Kasem has held that the bequest is lawful as to the *rubât*, but is void as to the removal of the body, and that if the executor should incur any expense in removing it without the sanction of the heirs he will be responsible for the amount expended, though if he has their authority for the removal he does not incur any responsibility. A direction by will to ornament the testator's tomb is void. But with regard to a direction to provide food for mourners after the testator's death and for those who may be present at his funeral, the lawyer Abû Jâfer has said that it is lawful as regards a third of the estate and that all may lawfully partake of the provision who prolong their stay at the funeral, or who come from a distance, rich and poor alike but that if there is any lavish expenditure in the preparations the executor is liable for the excess. According to Shaikh Imam Abu Bakr of Balkh, a direction by will to provide food for three days after the testator's death is void. * * * In the *Wakiât-i-Natiki* it is stated that if a person should direct that a thousand dinars or ten thousand dirhems be expended on his shroud, no more than a medium expense is to be incurred on that account and only the cloth which the testator used

[1] Radd-ul-Muhtar, V. p. 643. Fatâwa-i-Alamgiri, VI, p. 141. Sharâya Jawahir-ul-Kalam.

[2] Baillie, p. 633.

for going to the mosque on Fridays should be used. And if a woman should direct her husband to pay for her shroud out of the dower due to her by him, it has been said that whatever she may direct or forbid on that subject, is alike void. When a person directs that he shall be buried in his mansion, the bequest is void unless he direct the mansion is to be converted into a general cemetery for Moslems. A direction that the testator's grave be plastered and a vault or arch placed over it is unlawful except in places where such precautions are required against the ravages of wild beasts. So also a direction that so much of one's property be given to persons for reading the Koran over the testator's grave is void even (it would seem) though special readers be appointed for the purpose.[1]

Under the Shiah law bequests are lawful for the following purposes :—

(*a*) for offering prayers for the testator in perpetuity or for a limited period;

(*b*) for carrying the body of the deceased to Kerbela or any other holy place;

(*c*) for some one to perform a pilgrimage on behalf of the testator;

(*d*) for burning lights and putting flowers on his grave or in the shrine of the Imams;

(*e*) for relieving the poor Syeds of Kerbela and Najaf;

(*f*) for feeding the poor on particular holy festivals;

(*g*) for reading *mursias* (elegies) in the Imambaras;

[1] This passage is taken from the Alamgiri, (VI, p. 148). See, however, Radd-ul-Muhtar, p. 677. The illegality of hiring a person for reading the Koran over the grave of the testator is founded on the unlawfulness of hiring people for performing one's devotions; "it is only in cases of necessity," says the Radd, "that persons may be hired to perform devotional functions, such as the teaching of the Koran or Law or performing the *azán*. The jurists are agreed that a person cannot be hired for performing fasts, prayers, *hajj*, etc." According to present usage, most of these provisions have fallen into desuetude.

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(*h*) for offering sherbet or supplying water in the time of Mohurrum and such like objects;

(*i*) A *wasiut* may be made by one person to another for the performance of religious ceremonies on the testator's behalf; for example, A on the point of death may ask B to perform the prayers which he has left unperformed during his lifetime, and B accepts the *wasiut*, it is valid and he will be bound to perform the same.[1]

[1] Jama-ush-Shattat.

CHAPTER XVII.

SECTION I.

WHO MAY BE LEGATEES OR DEVISEES.

The Musa-lahu.

In principle a *wasiut* is lawful for any person or object actually or constructively in existence at the time of the disposition.[1] "It is an indispensable condition," says the Sharâya, "that the legatee be in existence at the time of the bequest, and if he should not be alive, the legacy is not valid, in the same way as a legacy to a person deceased, or to one supposed to be alive but who is afterwards proved to have been dead at the time of the bequest." So also it is stated in the Alamgiri, that "there is no bequest for the *non-existing* or the dead." LECTURE XIII.

We will now consider the objects or persons in whose favour a *wasiut* way validly be made:—(*a*) with the exception of the Shâfeïs who regard a bequest by a Moslem to a non-Moslem to be unqualifiedly unlawful, all the other schools admit the validity of a *wasiut* in favour of a non-Moslem who does not belong to the *Dár-ul-Harb* and consequently is not an alien.[2] The Radd-ul-Muhtâr and

[1] Radd-ul-Muhtar, V, p. 661 ; I. L. R. 9 Bom. p. 158.

[2] For the reasons which compelled the Moslems to withhold the privilege from the *Harbis*, see the "Critical Examination of the Life and Teachings of Mohammed." The Mahommedan Law is decidedly more generous than the English law was until a few years ago. The incapacity of aliens in England was removed only in 1870.

the Alamgiri lay down this principle with the utmost distinctness. "A Moslem" says the Alamgiri, "may lawfully make a bequest to a *zimmi* or *vice versâ*, but a bequest to an alien who is not a *mustâmin* is not lawful. If a Moslem make a bequest to an alien living in a *dâr-ul-harb* or hostile country, the bequest is not lawful, even though the heirs should give their consent. And if the alien should come into Moslem territories under an *âmân* or protection, intending to take his legacy he cannot do so, even with the consent of the heirs. This is when the testator and the alien legatee were both in the *dâr-ul-Islam* at the time. If the testator were also in the *dâr-ul-harb* 'our' doctors differ as to the legality of the bequest. When the alien is a *mustâmin* residing in Moslem territory, it seems, on the authority of the *Zâhir-ur-Rewâyet*, that a bequest to him would be lawful to the extent of a third of the testator's property without the consent of the heirs and beyond that amount with their consent.[1]"

A similar rule obtains among the Shiahs on the subject. The Sharâya declares,—"With regard again to legacies in favour of *harbis* or hostile infidels there is some doubt, but according to the most authentic traditions they are forbidden and null."[2] And in the Radd-ul-Muhtâr a *harbi* or hostile non-Moslem is regarded as civilly dead.[3]

But whilst a devise by will is invalid in favour of an alien, presents and gratuities may lawfully be made to him. "In the *Sharh-ul-Kabîr* of Sarakhsi it is stated" says the Radd-ul-Muhtâr, "that there is no objection to a Moslem making presents or giving rewards to infidels,

[1] The rules with reference to the wills of non-Moslem subjects of Mussalman sovereigns are given in note 1 to this Chapter.

[2] Baillie's Imamia Law, p. 244; Sharâya.

[3] Radd-ul-Muhtar, V, p. 664.

whether they be relatives or not, and whether they be aliens or *zimmis,* and the legality of this is founded on the tradition that the Prophet (may the blessings of God rest on him) sent various presents to Abû Sufiân ibn Harb and Sufiân ibn Ommiah for distribution among the poor of Mecca.[1] And the reason of this is that presents to one's relations is commendable to every man and acceptable in every religion, and to strangers because it is an act of kindness and generosity. Accordingly presents may be made lawfully to aliens, excepting of arms and armour".[2] But a bequest to an apostate is not lawful under any of the schools.[3]

(*b*) A disposition in favour of an infant *en ventre sa mere* is valid according to all the sects, but according to the Hanafi law, the child should be born within six months from the date of the *wasiut* in which case it is presumed to have been in existence at the time of the bequest.[4] In the case of infants (including an infant *en ventre sa mere)* acceptance will be presumed unless it would cause injury to the devisee or legatee. The right of the infant *en ventre sa mere* to the bequest is established upon birth and until then no person can exercise any right on its behalf, for example, commute the bequest or compromise the claim of the unborn legatee. The Radd-ul-Muhtâr expressly lays down that for the "child in the womb

[1] Who were infidels at the time.

[2] Radd-ul-Muhtar, V, p. 643.

[3] Fatâwa-i-Alamgiri, VI, pp. 140, 141; Sharâya, Sautayra, II, p. 342. Act XXI of 1850 makes no difference in the provisions of the Mahommedan law on this subject.

[4] A bequest to a child in the womb if born within six months from the date of the bequest is valid; Fatâwa-i-Alamgiri, VI, p. 140. Radd-ul-Muhtar, V, p. 661. Baillie, p. 627. In the *Nihaya* it is stated that the six months should be computed from the date of the death of the testator. Radd-ul-Muhtar, V, p. 662.

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there is no *wali*,[1] for the word (*moula*) requires a *wali* in order to secure tender care and the infant in the womb does not stand in that need; as a matter of fact it is a part of the mother, and as there is on the part of the father no right of guardianship in respect of the mother, consequently the father cannot be the *wali* of the child in the womb, nor can the mother be the *wali* of the child in her womb, and accordingly she cannot exercise any right in respect of any legacy left to such child, for though it is a part of her body, yet really it is a soul entrusted to her charge *and the soul being in existence a bequest to it is lawful*."[2] "A *wasiut* is from one point of view *tamlîk* and from another point of view appointing a successor to the rights of the testator (in a portion or the whole of his estate) and therefore though no *wali* can be appointed for an infant *en ventre sa mere*, according to all the authorities such as Allamah-Ibn-Shibli, Halwâï and other *mashâikh*, an appointment of a *wasi* or executor for such an infant is lawful, as is lawful the appointment of a *wasi* in the case of a *wakf* for unborn children. Such appointment takes effect upon the birth of the child when its right vests in the bequest."[3]

When the father of the child is alive, the birth of the child should be within six months from the date of the bequest in order that the right to the legacy may vest in it, but when the father is dead or the mother is divorced, the birth should be within six months from date of bequest and within the longest period of gestation (recognized by law) computed from the date of the father's death or the *talâk* of the mother. For, should the birth take place

[1] "A fœtus can neither be constituted a *wali* (guardian) nor can a *wali* be constituted for it."

[2] Radd-ul-Muhtâr, V, p. 642,

[3] *Ibid.*

after this period, the child cannot be presumed to have been conceived at the time of the bequest.

But though a direct *wasiut* or a legacy, in other words, a testamentary gift to an unborn child is valid only when it is *en ventre sa mere* and is born within six months from the date of the bequest, yet the law recognizes the validity of a *wakf bil wasiut, viz.*, (a testamentary disposition by way of a trust) in favour of unborn children to come into existence at any time, *when a commencement is made with a person in existence.* For example, a *wasiut* in favour of A (a living person) and his unborn children and descendants in perpetuity is valid according to all the schools. Such a *wakf* will have effect given to it by the appointment of *wasis* who would carry out the trusts of the settlement.

Shiah Law.

Under the Shiah Law there is no restriction as to the time when the child should be born to take the benefit of the bequest. It will be sufficient if the child is born within the longest period of gestation recognised by the Shiah law from the date of the bequest.[1] "A bequest to a fœtus in the womb actually existent is valid, but it requires that the child be produced alive, and if it is stillborn, the *wasiut* is void; while if it is born alive though it should die immediately after, the legacy descends to its heirs."[2]

Under the Hanafi law a child must also be born alive to be entitled to the legacy. "When a person makes a bequest to what is in the womb of a woman and she is delivered of a dead child, after his death, and a month after the bequest, the legacy is not for such child, but if the child be born alive, and then die, the

[1] See the Personal Law of the Mahommedans, p. 150.

[2] Sharâya-ul-Islam, p. 253. There is a distinction between a bequest to a fœtus and the bequest of a fœtus.

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bequest is lawful to the extent of a third of the testator's property, and is divisible among the child's heirs. If the woman should bring forth two children one dead and the other alive, the living child takes the whole legacy but if both be born alive and one of them die, the legacy is divided into moieties one for the living child and the other for the heirs of the dead one by way of inheritance. When a person makes a bequest in these terms: 'If there be in the womb of such a person a girl, she is to have a legacy of a thousand dirhems,' and if there be a boy, I bequeath to him two thousand dirhems, and the woman is delivered of a girl within a day of the six months after the bequest and of a boy two or three days later, the legacies to both are valid to the extent of a third of the estate."[1]

(3) A *wasiut* is also lawful in favour of the following objects :—

(*a*) To the poor generally or a particular body of them;

(*b*) To the holy shrine of Kaaba or any mosque;

(*c*) To Almighty God or to spend in the way of God *(sabîl illah)*;

(*d*) For *wujuh-ul-khair* or *wujuh-ul-birr* (good or charitable purposes) generally;

(*e*) "To fight in the way of God", *i. e.*, holy warfare;

(*f*) For the children of one's heir, the kindred, neighbours, *kowm, &c.*;

(*g*) For the emancipation of slaves;

(*h*) For the payment of one's debts;

(*i*) A bequest for feeding cattle is also lawful.[2]

(a) A bequest for the poor is lawful. It may be for the poor generally or for a particular body of them. According to the Hanafi law, "it is lawful for a Moslem to make

[1] Alamgiri, VI, p. 142.

[2] Radd-ul-Muhtâr, V, p. 652.

a *wasiut* in favour of poor Christians, for that is no sin, contrary to building a church for them which is sinful, and he who assists in building churches for them is a sinner."[1] And this principle applies to the poor of all creeds. Therefore, when a *wasiut* is generally for the poor, it would be applied to the poor of all creeds. Under the Shiah law, it is different. "When a Moslem," says the Sharâya, "has made a bequest to beggars [in general terms] it is payable only to those of his own religion, and in like manner if the testator be an infidel such a bequest is only to those of his own persuasion." A bequest for providing shrouds to the *Moslems generally*, or for digging their graves, or constructing aqueducts for them is bad according to Abû Yusuf as mentioned in the Nawâdir. But a bequest for the same or like purposes for *poor* Moslems is lawful.

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A *wakf* for the poor (Shiah Law.)

Abû Yusuf's views.

(*b*) Regarding a *wasiut* in favour of the Holy Shrine or a mosque, the Alamgiri provides as follows:—"If a person should bequeath a third of his estate to the Holy Shrine the *wasiut* is lawful and the third should be expended upon its buildings, lamps and the like; so also the bequest of a third of one's estate to be laid out on a musjid is lawful, and the third should be expended on its buildings and lamps." A man may, according to all the jurists, devise his land for the construction of a mosque. Similarly, it is stated in the Radd-ul-Muhtâr that "where a bequest is made of a third in favour of the *Bait-ul-mukaddas*[2] (the holy shrine) it is lawful, and it will be applied in [maintaining] the building and lighting it and for like purposes. The same rule applies to a bequest in favour of a musjid, and the legacy will be applied in its maintenance and preservation, and according to Kazi Khan, in lighting it in Ramzan [and other seasons]. In the Mujtaba, it is laid

[1] Alamgiri, VI, p. 148.

[2] This may mean the shrine at Jerusalem.

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down, however, that when a bequest of a third is made in favour of the Kaaba, it should be expended for the benefit of the poor of the Kaaba (*i. e.*, who derive alms from there;) and similarly in the case of *wasiuts* to a musjid and the *bait-ul-mukkadas*." Then the commentator proceeds to add,—"respecting a bequest in favour of a musjid there are two opinions, *one* that it is not valid, and *the other* that it is valid. There is some difference among those who uphold the validity of such a *wasiut* regarding the mode of its application; some say, that it should be applied in maintaining the mosque, that is, in keeping the building in repair and in lighting it; whilst others hold that it should be spent in charity for the poor attached to that mosque. Mohammed upholds the former view; whilst the latter is adopted by the author of the Mujtaba. As regards the question of invalidity, two jurists alone hold that opinion, but when the bequest is made in specific terms that it should be spent for the mosque, it is valid by consensus. Mohammed maintains its invalidity unqualifiedly .... It is advisable, however, to give the fatwa to the effect, that when it is made in favour of a musjid, it should be expended in charity to the poor of that mosque. [And Saijani has explained in detail about this, and reference ought to be made to *Sharh-i-wahbanieh* also.] In the Khulâsa it is stated that it is preferable to spend on them, but is lawful to give to the other poor also. This is the opinion of Abû Yusuf and the fatwas have been given according to it."[1]

A man may lawfully devise by will his land in favour of a musjid, though according to Abû Hanifa, he may not bequeath the same to be made a burying-ground for the indigent, or for the purpose of erecting an inn for the passers-by.[2] It is somewhat difficult to understand the

[1] Radd-ul-Muhtâr, V, pp. 652, 653. [2] Alamgiri, VI, p. 149.

reason of this distinction. The disciples, however, differ from the master and uphold bequests in favour of the latter objects also. LECTURE XIII.

(c) When a person makes a *wasiut* in the following terms, "I bequeath a third of my property to Almighty God," the devise is valid according to Mohammed,[1] and it would be applied or expended on good objects, *i. e.*, charitable or pious purposes generally. A *wasiut fi-sabîl-illah*, (*i. e.*, in the way of God) will be applied for fighting in the path of religion and can be applied lawfully to the help of a poor Haji who has lost his means. In the Nawâzil it is stated, the bequest may be applied in lighting lamps and promoting religion generally. According to the Shiah law "if the testator should direct a bequest to be expended in the way of God, it must be applied in some way to which reward is promised in a future state, but according to some exclusively in holy warfare. The first opinion, however, appears to be *better founded*."[2]

Shiah doctrines.

(d) When the bequest is made for good purposes (*wujuh-ul-khair* or *wujuh-ul-birr*, *objects of charity or liberality*), it includes all charitable and pious objects and may be applied either in erecting bridges or musjids, madrassas or hospitals, or supporting the students of learning.[3] "When

The following passage which occurs in the Alamgiri must be read with the light of the comment in the Radd-ul-Muhtâr. The statement as to the *fatwa* being with Ibn Zyâd seems to be founded on a mistake. "When a person has said I have bequeathed a hundred dirhems to such a musjid, or such a bridge, the bequest is valid according to Mohammed, and should be laid out in repairing and improving it, but according to Ibn Zyad when no mention has been made of repairs and improvements, the bequest is void and the *fatwa* is in accordance with his opinion."

[1] "And decisions are given according to his word."—Radd-ul-Muhtâr. Abû Hanifa holds such a bequest void.

[2] Mafâtih ; Jawâhir-ul-Kalâm.

[3] "It cannot, however, be applied in erecting prisons for that duty belongs to the Sultan."—Radd, V, p. 653.

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a bequest is made 'to fight in the way of God' on the part of the testator, maintenance is to be given to a *ghâzi* or religious warrior for his sustenence in going and returning and remaining with an expedition; but no part of it is to be expended on his family, and if there is any surplus it must be restored to the heirs. Though the warrior be rich that is no objection, and the executor himself or the son of the testator may fight on his account."[1]

(*e*) A bequest is valid for the children of one's heirs without difference since they are in the position of strangers. In fact a legacy may validly be left to any relation who does not take a share in the inheritance.

Bequest in favour of the kindred. (Shiah doctrines.)

The Mohakkik declares that a bequest in favour of one's kindred is highly proper whether they be his heirs or not, and when a person bequeathes a legacy to his *akrab* or nearest of kin, it is to be regulated by the rules of inheritance and nothing is to be given to a remote heir while there is a nearer in existence.

Under the Shiah Law, "If a person should make a bequest to his kindred (*zû kurâbut*) it is to be understood as intended for all known to be of his race (*nasab*) or of the same paternal descent. Some writers have said that it includes all those who are related to him through his most remote progenitors, both father and mother, who professed the faith of Islam; but this opinion is destitute of any testimony in its support. If again the bequest be to his *kowm* or race it includes all those who speak the same language, and if to the people of his house (*ahl-bait*) it includes his children, father and paternal grandfather. Further, if he say to his *as-hurah* (family) the nearest only of his *nasab* are to be understood as included in the bequest."[2]

[1] Alamgiri, VI, p. 148.

[2] Sharâya. See Appendix V.

"If a person make a bequest to his neighbours *(jirân,)* it includes, according to some doctors all those whose houses are within forty cubits *(ziraas)* of his, in every direction. But there is another opinion, which is far-fetched and unreasonable, that extends it to the occupants of forty houses on either side of his." Lecture XIII.

(*f*) The emancipation of slaves is highly commendable under the Mahommedan Law and religion, and consequently we find the regulations, relating to the testamentary emancipation of slaves, laid down in some detail by the jurists of all the schools. The subject is, however, of no practical importance, and therefore it is unnecessary to dwell upon it.

(*g*) The testator can by will direct his executor to sell his property, and after paying his debts, invest the remainder, either as *wakf* for charitable purposes, or distribute it among his heirs.

Section III.

GENERAL RULES OF INTERPRETATION.

The following rules have been adopted by the Hanafi lawyers, for the purpose of supplying a safe guide to the interpretation of devises and bequests, which may be involved in doubt and obscurity :— Rules of interpretation, (Hanafi Law).

(1) When the testator uses the expression, "I bequeath to the relations of my wife," the bequest would be to the benefit of her relations, both paternal as well maternal.

(2) When a legacy is left to "the nearest of kin," it would go to the maternal kindred only in default of paternal kindred.

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(3) When a disposition is made in favour of the relatives of a stranger it would be to the benefit of all his relatives, be they his blood-relatives or not.

(4) When the testator bequeathes his goods to the orphans, the blind or "the people" of such a race, or such a locality, the legacy would be divided among all those who answer the description, without distinction of age, or sex, or fortune.

(5) When the testator makes a disposition in favour of the *heir* of A, and A dies leaving several heirs, the legacy would be divided among them, in the proportion of their legal shares.

(6) When the bequest is in these terms, "I bequeath to such a family," (mentioning it by name,) according to Abû Hanifa, the bequest will be in favour of the head of that family. According to Abû Yusuf and Mohammed, the legacy will be divided, as in the preceding case, among all the members of his family.

(7) When the legacy is left to the neighbours, it will go to such of them as are nearest, or whose residence is contiguous to the testator's. Abû Yusuf and Mohammed hold that if several people reside in that house, the legacy will go to all of them in equal shares including women and children.

(8) When a legacy is in favour of soldiers and "the unhappy," it does not impose on the heir, or the executor, or the Kazi, the obligation of finding out all those people who satisfy the condition. It is allowable to the administrator or executor, to distribute it among those who are forthcoming, unless they are specifically mentioned or indicated.

Bequest to a neighbour.

If a person make a bequest in the following terms:— "I bequeath one thousand rupees to my *neighbour*," according to Abû Hanifa it would go to the person whose

house is contiguous to that of the testator. Abû Yusuf and Mohammed maintain that it should go to all the inhabitants of the vicinity, who belong to the same mosque. The fatwa, however, is with Abû Hanifa if only one neighbour is meant; but if the testator meant more than one, the matter should be left to the discretion of the Judge.[1]

The passage in the Alamgiri on this subject is to the following effect:—"When a person bequeathes a third of his property to his neighbours, some say, that if they can be numbered, the third is to be divided among them all, rich and poor. And it is to be divided in like manner if he should say 'to the people of this musjid.' The definition or meaning of 'cannot be numbered,' according to Abû Yusuf is, that the persons cannot be computed without the aid of a written account; but according to Mohammed it refers to a number exceeding a hundred. Others, however, have said that the matter should be left to the discretion of the Judge and the fatwa is to that effect, though Mohammed's rule is easier. If the neighbours cannot be numbered, the legacy is void; and so also when the legacy is to the people of the musjid, or of the *sijn* or prison, and they cannot be numbered. Mohammed has said that when a bequest is made to the orphans of the *bunni* (posterity) of a particular person and they can be numbered, the legacy is to be expended on all, in the same way as if it were on 'the orphans of this street' or 'of this mansion,' rich and poor participating alike; but if they cannot be numbered, the legacy is to be expended on the poor among them."

"With regard to who among the neighbours are entitled to share in the bequest, the *mashâikh* are of opinion that every person may be included under the description of

[1] Fatâwa-i-Alamgiri, VI, p. 142.

neighbour, whether the proprietor of a house or not, or whether a man or a woman, a Mussulman or a *zimmi;* the term neighbour being equally applicable to all these. Abû Hanifa also holds that an absolute slave possessed of a house in the neighbourhood is entitled to the benefit of the will."

If a person were to make a bequest in favour of his *as'hâr*,[1] all the relations of his wife within the prohibited degrees (such as her father, brother and so forth), are included in the description, and likewise all the relations of his father's wife (his step-mother), and of his son's wife [his daughter-in-law], within the prohibited degrees, as these all stand in the relation of *as'hâr* to the testator. It is to be observed that all the kindred of the wife within the prohibited degrees are included in the bequest, notwithstanding that she was at the time of the death of the testator observing the *iddat* from a reversible divorce. But if the divorce was irreversible, her relations are not to be included, as the existence of the relationship entitled *as'hâr* depends on the actual existence of the marriage at the time of the testator's death, and by an irreversible divorce marriage is utterly annulled.

If a person were to make a will in favour of his *relations* (*akriba*,) it is construed to be in favour of the nearest of kin within the prohibited degrees, and in their default to be in favour of the next in proximity, and so on in regular succession. According to Abû Hanifa, the bequest in question is restricted in its operation to the prohibited relations of the testator, whereas according to the two disciples it extends to all the descendants of the most distant progenitor, professing the faith of Islam; whilst Shâfeï maintains that it is confined solely to the testator's father [and his offspring].

[1] People connected to him by affinity.

If a person, having two paternal and two maternal uncles, were to make a will "in favour of his relations" [*akriba*] according to Abû Hanifa it will be in favour of the paternal uncles only. According to the Disciples all the four uncles will be included. If, on the other hand, the testator have only one paternal and two maternal uncles, the half of the legacy in that case goes to the paternal uncle, and the other half to the two maternal uncles. If the bequest had been for the next of kin the whole legacy would go to the paternal uncle, and nothing to the two maternal uncles. When there is only one paternal uncle he is entitled only to a moiety.[1] If, however, the testator died leaving him surviving a paternal uncle and aunt and a maternal uncle and aunt, the legacy would be divided in equal shares between the paternal uncle and aunt both being related to him within an equal degree of affinity, and the tie of blood between them and the testator being regarded as stronger than that existing between him and the maternal uncle or aunt. A paternal aunt, moreover, although she is not entitled to inherit, is nevertheless capable of taking a legacy, "in the same manner," adds the Radd-ul-Muhtar, "as a relation who is a slave or an infidel." In all these cases if the testator leaves no relation within the prohibited degrees, the bequest is null, because it is confined in its operation to those relations only.

When a bequest is made in favour of the orphans, the blind, the lame, or the widows of the race of a particular individual, and they are determinate in their number, the bequest would be in favour of all of them indiscriminately, whether rich or poor, male or female; for the execution of the bequest is practicable in this instance because of the

[1] For the reasons of these principles see the Hedâya and the Radd *in loco.*

LECTURE XIII. ascertainment of the legatees. According to Abû Yusuf this phrase, "if they can be enumerated" comprehends as many as can be counted, without the aid of written calculations; whereas Mohammed holds that it extends no further than to one hundred, any greater number being considered as beyond enumeration. Some, on the other hand, allege that the determination of this point rests entirely with the Kazi, *and decrees pass accordingly.* But, if the individuals of the race named be incapable of being enumerated, the poor only are included in the bequest, not the rich, for it [the bequest] is of a pious nature, and the object of it (namely the good will of God) is best attainable by removing the wants of the poor. Besides, as the very description used indicate a degree of want and distress on the part of the legatee, it is proper to admit this to have been the testator's meaning. It is otherwise where a person makes a bequest "to the youths or the maids of a particular race," who are innumerable; in such case the bequest is void, because, as the description used does not indicate want, the words of the testator cannot be construed to apply to the poor; neither can the bequest possibly hold valid in favour of all the individuals of the class named, since as they cannot be enumerated it is impracticable to define them, and a bequest to unknown legatees, is void. For a bequest is an act by which the testator invests another with the right of property and it is impossible to confer that right on persons unknown. It is to be observed that in the case of bequests to the poor or distressed, the legacy must be paid at least to two paupers, two being the smallest number of plurality in *wasiut.*

Where a bequest is made to the children (*awlâd*) of the race of a particular person—the males and females have an equal right in such bequest, as the term *awlâd*

comprehends all the descendants. A bequest to the heirs of a particular individual will be divided among the heirs of the person named, according to the rules of intestate succession, a male getting double the share of a female because there is reason to imagine, that the object of the testator in using the word "heirs" was, that the same distinction might be observed in the partition of the legacy, as in the case of inheritance.

If a person bequeath to a certain person a portion of his property exceeding the disposible third, his disposition will be reduced to the third.

Hanafi Law.

"And when a man," says the Alamgiri, "has bequeathed a third of his property to one person and a third of it to another, and both bequests are allowed by the heirs, the legatees have two-thirds and the heirs one-third, and if the bequests are not allowed by them, the legatees have the third between them in halves. Where the testator has bequeathed a third of his property to one person and one-sixth to another, the reduction must be proportionate, for example, the first legatee instead of getting one-third will get two-ninths, and the second legatee one-ninth together constituting one-third."

So also in the Radd.—If a person were to bequeath a third of his estate and effects to Zaid, and a third to another, and the heirs do not assent to the bequest, a third will be divided equally between the two legatees. If he were to give a third to one and one-sixth to another, the third would be divided among the two in the proportion of two to one. If he were to bequeath the whole of his property to one and one-third to another, the third will be divided among them equally.[1]

There is considerable dispute, however, as to the division of the bequest, should the heirs consent, though in

[1] All this is when the heirs do not assent.

the result it appears that the entire estate and effects will be divided into four *sahams* or shares, one of which will be given to the latter legatee, and three to the former.

Shiah Law.

Under the Shiah law the second legacy would fall to the ground, the first legatee getting the entire disposible third. The Sharâya has stated the principle in the following terms:—

"If a person should bequeath a third of his estate to one legatee, a fourth to another, and a sixth to another, and the heirs should refuse to confirm his bequests, a third of the estate is to be given to the first legatee and the other legacies are void. But if he should bequeath a third of his estate to one person, and then a third or the same portion to another, this would be a revocation of the legacy to the first in favour of the second, and should a doubt arise as to the person first mentioned it must be determined by drawing lots. If a person bequeathes one article to two persons, and the value of the article exceeds a third of his estate while the heirs refuse their assent to the excess, so much of the article as is covered by a third of the estate is the joint property of the legatees. If, on the other hand, he bequeath a thing to each of the two, a beginning must be made in favour of the person to whom the bequest was first made and the deficiency must fall solely on the second."[1]

The operation of this principle extends equally to indeterminate as well as specific legacies, for example, if a person were to bequeath to another a sum of money, or a share in his inheritance, and to another that which would be sufficient for his maintenance for a limited period of time, this last legacy would be appraised or valued, and then the two legacies will be dealt with according to the principles already stated.

[1] Imamia Law, p. 235.

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Hanifa Law.

When a bequest is made to two persons respectively of a half and one-fourth of the testator's estate and effects, the legatees will receive the shares given to them, provided the heirs consent, the residue going to the heirs. But if the heirs do not assent to the bequest, the legacies will have effect given to them out of the disposible one-third, which is to be divided into seven parts, four being given to the legatee of the half, and three to the legatee of the one-fourth. This is according to Abû Hanifa; but according to Abû Yusuf and Mohammed, the third is to be divided into three shares two of which are given to the legatee of the half, and one to the legatee of the fourth.[1]

Where a bequest is made of specific sums of money,[2] say of a thousand dirhems to one person, and two thousand dirhems to another, and the disposible third only amounts to one thousand dirhems, according to Abû Hanifa, each legatee takes in proportion to the full amount of his legacy, and the thousand is divided between them accordingly. In all these cases, the legatee takes in proportion to the full amount of his legacy, because *primâ facie* it is valid since the testator may have left so much other property that this amount may come within a third of it. And all the jurists are agreed that when each one of several legacies does not exceed a third of the property, as for instance, when a third is bequeathed to one, and a fourth to another, and the heirs do not allow both, each legatee is entitled to a share in proportion to the full amount of his legacy whatever it may be, and the third is to be divided among them accordingly.

When a bequest is made in an indefinite form, for example, if a testator were to say, "I give a portion of

[1] Fatâwa-i-Alamgiri, Vol. VI, p. 150.

[2] Technically called *mursulla*.

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my property to so-and-so," he can at any time whilst alive explain his intention. After his death the explanation of the devise rests with the heirs. If the bequest is of a *saham* or *juzz*, some hold that the heirs are entitled to give what they please, but in the Mabsût it is stated that the legatee of a *saham* should have the equivalent of the smallest share of the heirs, provided it does not exceed a third; this is according to the Disciples. When a person has bequeathed a *saham* of his property and leaves no heirs, the legatee takes a half; for the *bait-ul-mâl* or treasury is in the place of a son, and the case is as if he had left two sons, when the estate would be equally divided between them.

If a person should bequeath *his son's or his daughter's share;* when he has a son or a daughter, the bequest is not valid because he is in fact giving away what belongs to another. But if he has neither son nor daughter the bequest is lawful. And if the bequest is *of the like of his son's or daughter's share*, the bequest is lawful though he should have a son or a daughter, *for the like of a thing is not the thing itself but something different.* The son's *share* is then to be ascertained and an equal amount given to the legatee; but if that should exceed a third of the estate, the bequest requires the consent of the heirs, while if it be only equal to or less than a third it is lawful without their consent. Consequently, if a person were to make to another the bequest of a son's share and he has only one son, the legatee will take half of his property if the heir consents, otherwise only one-third. Similarly, if he has two sons the legatee will take one-third according to Zailye. When the testator dies leaving him surviving an only daughter and the legacy is "of a daughter's share," the legatee will get half provided the daughter consents, otherwise one-third. If

there are two daughters, the legatee will get one-third according to the Manah, and if there are three daughters he will get only one-fourth. And this view is supported by the reference from the Mujtaba, which is the work of Imam Zâhedi. If a testator leave him surviving a son and a daughter and the bequest is "of a daughter's share" the legatee will get one-fourth. And if a testatrix leaves a husband, and three sisters of three kinds, (*e. g.*, full, consanguine, and uterine) and the bequest is of the share of a consanguine sister, the legatee will take one-tenth. This is the doctrine laid down in the Mujtaba. And the Hindyeh, (*i. e.*, the Fatâwa-i-Alamgiri) explains this rule thus:—the husband takes his specified share and the residue is divided among the legatees and the sisters in the proportions fixed for them by the law. If a testator dies leaving a mother and a son, and the bequest is of "a daughter's share," the property will be divided into seventeen shares, five of which will be given to the legatee, ten to the son and two to the mother.

To explain this case it is necessary first to take it as if there were no legacy, and then the estate would be divisible into six shares, whereof the mother would have one, and the son the remaining five. The bequest of a daughter's portion, if there had been one, requires an addition to be made to such a share, which being half that of a son, the addition must be two shares and a half which would make the whole eight and a half, or doubling them to get rid of the fraction, seventeen shares, whereof the legatee takes first five shares, for the legacy is here less than a third of the estate and takes precedence of the heritage of the heirs; and of the remaining twelve shares one-sixth or two shares are given to the mother and the other ten to the son.

If there be a daughter and a sister and the legacy is of a daughter's share, the legatee will take one-third whether the daughter and sister consent or not. This is laid down in the *Fatáwa-i-Nâmia* by Saijani.

And if a person should leave a wife and son, and make a bequest of the share of another son, if there had been one, the estate must be arranged into fifteen shares, *supposing the heirs to assent to the legacy.* Of these the legatee would take seven shares, the wife one share, and the son seven shares. Here, as in the last case but one let us first suppose that there was no legacy, and on that supposition the estate would be divided into eight parts whereof the wife would take one and the son seven. But now taking the legacy as the share of another son, if there had been one, we must add seven more to the number of shares thus making them up to fifteen. In this case, however, as the legacy is more than a third of the whole estate, the assent of the heirs is made a condition without which the legacy would not be lawful.

When a person has died leaving a daughter and a brother, and has bequeathed to another person the share of a son, there being no son the legatee has two-thirds of the estate and the other third is divided between the daughter and brother in halves, that is, when the heirs consent to the legacy; but if they do not consent, the legatee has only one-third, and the other two-thirds are to be divided equally between the daughter and brother. When again the bequest is of *a like to the share of a son if there were one,* and the other circumstances are the same, the legatee has two-fifths of the property if assented to by the heirs. When again a person has died leaving a brother and sister, and has bequeathed to another person *the share of a son if there were one,* and the bequest is allowed by the

heirs, the legatee takes the whole property, leaving nothing to the brother and sister; while if he had bequeathed *the like of the share of a son if there were one*, and the heirs had allowed the legacy, the legatee would only have a half, and the other half would be divided between the brother and sister in thirds, (that is, two portions to the male and one to the female). In both cases if the legacy were disallowed by the heirs, the legatee would only have a third, while the other two-thirds would be divided in the same way between the brother and sister.

All this refers to cases where the testator leaves heirs behind. In default of heirs, should a testator leave a legacy, describing it as the share of a particular heir, the legatee will get one moiety and the remainder will go to the *bait-ul-mál*. This is according to the approved doctrine and the *Jouhara*. The heir is the *sahib-i-hakk* and cannot be deprived absolutely of a share in the inheritance.[1]

If a bequest is made of a third of the testator's estate to Amr and Zaid, but Amr is dead at the time of the bequest, the entire third will go to Zaid, and the rule is, that there is no right in the non-existing or dead. Abû Yusuf holds that if the testator was unaware of the death of Amr at the time of the bequest, a moiety only will be given to Zaid. This is according to Zailye. For a bequest to Amr and Zaid, when Amr is dead, is like a bequest to Zaid and an inanimate object. But when a legacy is left *between* Amr and Zaid, and Amr is dead at the time, half alone will be given to the surviving legatee, for the word "between" implies that it was to be given in moieties.[2]

[1] Radd-ul-Muhtâr, V. p. 659. See Appendix VI.
[2] *Ibid.*

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If a person were to make a bequest in the following terms, "my executors shall give one-third of my *mál* for A and for the son of Abdullah, if the latter is in want at the time of my death;" and at the decease of the testator, the son of Abdullah is found to be rich, only half of the third will be given to A.[1]

[1] "If a man should bequeath a third of his property to Zaid and Bakr, Bakr being dead at the time, whether with or without the knowledge of the testator, or to Zaid and Bakr if he be alive, he being in fact dead, or to him and to the person in this house, no one being in the house, or to him and to his posterity (*akab*), or to him and to a child of Bakr, and his child dies before the testator, or to him and to the poor of his children, or to him who may become poor of his children, and the condition fails at the time of his death, the whole legacy is to Zaid, in all of these cases, for the non-existing or the dead can have no right, and there being no one to contend with Zaid, the legacy is the same as if it were to him alone. With regard to the case of Zaid and his posterity as they are to follow him after his death they are to be considered as non-existing at present. In all these cases the competitor with Zaid is out of the contest from the beginning, but if he were at first competent to contend with him, and should subsequently become disqualified by failure of a condition, Zaid would have only a half. Thus, if a person should say,—'A third of my property to Zaid and Bakr if I die, he being alive or poor, and the testator dies when Bakr is dead, or rich, or if he should say 'to him and to Bakr if he be in the house,' and he is not in it, or 'to him and the children of such an one if they became poor,' and they do not become poor till the testator dies or 'to him and to his heir;' in all these cases the legatee has only half of the third. The principle in these cases is, that when the person conjoined with another has entered into a bequest, and then comes out of it by the failure of a condition, he does not occasion any accession to the right of the other, and that when he has not entered into the bequest for want of personality or competence (*ahliut*), the other takes the whole. And if one should say—'A third of my property between Zaid and Bakr,' Bakr being dead at the time, Zaid would have only a half of the third, because the word between implies a division in half insomuch that if he were to say between Zaid and then stop, Zaid would have a half also, yet if one should say, 'A third of my property between the sons of Zaid and the sons of Bakr,' and one of them has no sons, the whole third belongs to the sons of the other. If one should bequeath a third of his property to Zaid and to Amr, or should say between Zaid and Amr, and should then die, and one of the legatees should die after him, half of the third would belong to the survivor, and the other half of it to the heirs of the

The same result would follow, if one of the legatees should die during the lifetime of the testator. The principle is this, that when the legacy is in favour of existing objects or persons, and one of them should cease to exist after the *wasiut*, the other legatees would receive their original shares, and the share of the deceased legatee would lapse to the residue of the estate; but if one of the legatees was non-existing at the time, or not possessing the quality required by the testator to take the bequest, then the whole would go to the existing legatees. This is according to Zailye.[1] For example, if a bequest were made in favour of A and of persons residing in a particu-

deceased legatee. So also if one of them should die after the testator but before acceptance of the legacy and the survivor should then accept, both legatees would be entitled to the bequest. But if one of them should die before the testator, the share of the legatee so dying would revert to the testator."

"When a person says: 'A third of my property to such an one and to whomsoever may become poor of the children of Abdullah' and then dies, all the children of Abdullah being rich at the time, such an one gets the whole third. But if some of them should become poor before the death of the testator, the third would be divided between such an one and the poor children of Abdullah according to the number of heads (*per capita*). If again the children of Abdullah had never ceased to be poor from the time of their birth to the death of the testator, it would seem that none of them would be entitled to any part of the third, but that the whole of it would devolve on the other legatee such an one. If the children of Abdullah in existence at the time of the bequest should die, and other children be born to him who at first being rich should become poor before the death of the testator, the third would be divided between them and between such an one according to the number of heads. So also if the terms of the bequest were, 'A third of my property to such an one and to the child of Abdullah,' and the child of Abdullah dies but another is born to him before the death of the testator, the legacy is between such an one and that child of Abdullah. And if one should say, 'A third of my property to such an one and to the offspring of Abdullah these if they become poor' and they do not become poor till the death of the testator such an one is entitled to a share of the third, regard being had to the number of heads." Alamgiri, VI, pp. 161-162. Baillie, p. 642.

[1] Radd-ul-Muhtar, p. 661.

lar house, the whole bequest would go to Zaid, for there is no bequest in favour of the *mádoom* (معدوم) or non-existing persons.[1] The same result would follow if a person were to say "for A and his *akab*," for *akab* are the people whom a person leaves surviving, and they cannot be determined at the time of the bequest. This is in the *Durrur*. Similarly, if he were to say "This legacy shall be for Zaid and for the son of Abdullah, if he lives in my house;" and the son of Abdullah were not to live in that house, the entire legacy would go to Zaid. But when a legacy is in favour of Amr and Zaid, and Amr dies after the testator's death, his share will go to his heirs.

When a woman dies leaving a husband, and having bequeathed half of her property to a stranger, the bequest is lawful, and the husband is entitled to a third and the legatee to a half, which leaves a sixth to the *bait-ul-mál*. For the legacy to a stranger has precedence to the extent of a third over the rights of the heirs, and there remain two-thirds of the property to be divided as inheritance. Of this one half, that is, a third of the whole, belongs to the husband, leaving a third to which no other heir is entitled. The remainder of the legacy therefore becomes operative against it, and that being a sixth, the legacy is raised to a half; while there being no heir entitled to the remaining sixth, it falls to the *bait-ul-mál*. In like manner, if a man should die leaving a wife, and having bequeathed all his property to a stranger, and the widow should refuse her sanction to the bequest, she would be entitled to a sixth of the property and the legatee to the remaining five-sixths. For he is entitled to a third by virtue of the bequest, and of the remaining two-thirds the widow takes a fourth, which is equivalent to a

[1] Radd-ul-Muhtâr, p. 661.

sixth of the whole, and the legatee takes the remainder since he is preferred to the *bait-ul-mál*.

When a man bequeathes a third of his property to the sons of a particular person, and the person has no son at the date of the bequest, but sons are subsequently born to him before the testator's death, these sons are entitled to the third.[1] And even though the person had sons at the date of the bequest, yet if they were not mentioned by their names as Ahmed, Zaid and Bakr, or otherwise specifically indicated, the bequest would be to all the sons existing at the time of the testator's death. So that if those in existence at the date of the bequest should die, and others are subsequently born who are living at the time of the testator's death, these are entitled to the third of the property. If, however, the existing sons are mentioned by name, or are otherwise distinctly indicated, the bequest is only to them, and becomes void in the event of their death. Thus, when legatees are named or otherwise distinctly indicated, the bequest to them is said to be special, and regard must be had to the time at which it was made.

When a man bequeathes a third of his property to his *umm-i-walad* being three in number, *and to fakirs and miskîns* (beggars and indigent persons), the property will be divided into five shares, out of which three are given to the *umm-i-walad*, one to the *fakirs* and the remaining one to the *miskîns*. This is according to Abû Hanifa and Abû Yusuf. Mohammed would divide the property into seven shares, and give three to the *umm-i-walad*, and two each to the beggars and indigent. The former opinion is the one approved. Similarly, if a man should bequeath a third of his property to Zaid and the *miskîns*, Zaid takes half and the latter take half according

[1] Radd-ul-Muhtâr, V, p. 661.

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to Abû Hanifa and Abû Yusuf.[1] When a person bequeathes one-third of his property to Zaid, the beggars and the indigent, according to Abû Hanifa the property will be divided into three shares, according to Abû Yusuf into two moieties, and according to Mohammed into five shares, and this is the approved doctrine. When a person bequeathes a third to the poor, it may be expended, according to Abû Hanifa and Abû Yusuf, on one poor person, but Mohammed holds that there must be at least two poor persons. But when a body of *miskîns* is indicated, the bequest cannot be expended on one only; there is a general consensus on this point.

If a person were to make a bequest for the poor of Balkh, it may lawfully be expended on other poor also, according to Abû Yusuf. And the *fatwa* is on this.

When a person bequeathes a third of his property to one man, and then says to another, "I have made you a partner and joined you with him," the third belongs to them both. And if, after bequeathing to one man a hundred, and to another a hundred, he should say to a third, "I have made you a partner with them," the person addressed would be entitled to a third of each hundred.

When a man makes a bequest to a stranger and *his* heir, the stranger takes half of the bequest and the remainder is void, and in like manner if the bequest be to a homicide and a stranger.

If a person possessed of three garments of different qualities, one good, the other middling, and the third bad, bequeathes them to three different legatees, and one of the garments is then lost or destroyed, but which of them is not known, and the heirs refuse to make delivery of the remaining garments to any of the legatees, saying to

[1] Radd-ul-Muhtâr, V, pp. 662-663; Mohammed would divide the property into three shares.

each of them, 'the garment in which you had a right has been destroyed,' under these circumstances since the right of the parties is not defined, and the ignorance of this fact prevents the validity of any judgment that may be pronounced in the matter, and the attainment of the testator's object, the bequests must be pronounced as void, unless the heirs will deliver up the remaining garments. If they should do so, the objection is removed, and the legatee of the best is entitled to two-thirds of the better of the remaining garments, the legatee of the middling garment is entitled to the remaining third of the better, and a third of the worse, while the legatee of the worst is entitled to the remaining two-thirds of the worst garment.

Any increment, such as the young of cattle or the produce of grain, arising out of the subject of a bequest before the death of the testator is the testator's property, and subject to the same liabilities as the rest of his estate. An increase that occurs after his death, and the partition or distribution of his estate belongs to the legatee. An increase that occurs between these events or after the testator's death, but before partition, may occur either before or after the acceptance of the legacy by the legatee. In the former case, it is a legacy because it is an accessory to the original subject of bequest and must come out of the third of the estate, that is, is valid only if it falls within the third. But is it so in the latter case also, that is, when it occurs after acceptance and before partition? On this point Mohammed has not left any express *dictum*, but Kudûri has related that in this case the increase is not a legacy and comes out of the whole of the property. "Our" Shaikhs, however, have said that it is a legacy and must come out of the third.

When a separable accession to the subject of a bequest takes place after the death of the testator, if the ori-

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ginal subject and the accession both come out of the third, they belong to the legatee. If they exceed the third, effect is to be given to the legacy, in the first place as against the original subject, and then as against the accession according to Abû Hanifa, but against both *equally* according to the two disciples, *e. g.*, if the testator has left six hundred dirhems and a mare, of the value of three hundred dirhems, which after the testator's death but before the partition of his estate, foals, the young animal is also valued at three hundred dirhems. Under such circumstances (the principal and accessory bequests amounting together to six hundred dirhems), the legatee is entitled to the mare and one-third of the foal (making together four hundred dirhems or a third of the whole) according to Abû Hanifa, while according to the two disciples, the legatee is entitled to two-thirds of each. This is on the assumption that the mare foals before the acceptance by the legateé of the original bequest, as well as before partition. If the mare foals after the legatee has accepted the bequest and after partition it belongs to him; but if after acceptance but before partition, Kudûri holds that it is not a bequest, while "our" Shaikhs have held that it is a bequest, and is to be regarded as coming out of the third in the same way as if the mare had foaled before acceptance. If it takes place before the death of the testator, the foal never comes within the bequest, but is subject to the same rules as the rest of the deceased's property.

Shiah doctrines.

According to the Shiah Law, "if a person should make a bequest of half of his property, and the heirs at first should assent, but afterwards declare that they thought the amount to be trifling, decree is to be given against them for the amount which they insist that they thought the legacy to be, and they are to be put upon

their oaths as to the excess, but this is subject to some doubt. And if the bequest were of a slave or a mansion, and the heirs after first assenting to it should then allege that they thought it was no more than a third of the deceased's estate, or if more, only so in a trifling degree, such claim or allegation on their part cannot be attended to because their consent in this case involves a known object of the value of which they cannot pretend ignorance at the time of assenting to the bequest. If a person should bequeath a third of his property by way of *mushaá* or undividedly, the legatee is entitled to a third of everything of which he died possessed. If, again, he bequeathes a specific article which is of the value of a third of his estate, the legatee becomes by his death the sole proprietor of the article bequeathed nor have the heirs any ground of objection thereto. And if the deceased should have left both present and absent effects, (such as ready-money and debts for example,) so much of the specific thing must be surrendered to the legatee as a third of the property presently available will admit of, while he will have to wait for the remainder of it until it is recovered by the heirs, since what is not forthcoming is liable to loss or destruction and may never be realized. Consequently, if the bequest were of a third of his slave, two-thirds of whom prove to be the property of other parties, effect is to be given to the bequest over the whole of that third which belonged to the testator, and it is not restricted to a third of the third, because effect can be given to the will without encroachment on the rights of the heirs, that is, assuming that the rest of the testator's property is equivalent in value to two-thirds of the slave."

Specific legacies.

"When a person has made a bequest, and then another which is repugnant to it, effect must be given to the latter."

Two bequests, one repugnant to the other.

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"When a person has said, 'if there be a male in the womb of this woman, he is to have two dirhems, and if there be a female she is to have one dirhem' and the mother is delivered of both a male and a female they are to have three dirhems; but should he have said, 'if what is in her womb be a male he is to have so and so, and if a female so and so' and the woman is delivered of both a male and a female they are not to have anything."[1]

Usufructuary wills. (Shiah doctrines continued.)

"If a person should bequeath the service of his slave, the fruit of his garden, the residence of his house or anything else of a usufructuary nature, for ever, or for a fixed time, the advantage or profit to arise therefrom must be valued and should it not exceed a third of the testator's estate the bequest is valid, while if more than a third the legatee is to have as much as the third will cover and the legacy is void as to the excess."

"When a person has bequeathed the service of his slave for a fixed period, the expense of the slave's maintenance must be defrayed by his heirs; as this is a duty which follows, or is dependent on the ownership of the slave, and the legatee is entitled to no more than the service of the slave, while all the other rights of ownership appertain to the heirs, as sale, manumission and the like, none of which, however, has the effect of invalidating the rights of the legatee."

"In all cases where a testator may have employed a term which is common or equally applicable to several things the heirs have an option to fix on whichever of the things they please and give it to the legatee. If, again, the testator should say, 'give him my bow' and only one is found in his possession that one must be given to the legatee of whatsoever description it may be."

[1] Sharâya; comp. for Hanafi Law *ante*, p. 476. Baillie's Imamia Law, p. 254.

Bequest of a portion of an heir.

"When a person has bequeathed to a stranger the like of his son's portion having only one child, this is in fact a partition of his estate between them, and the legatee is entitled to a half of it unless the heir refuses his consent to the full bequest, in which case the legatee's interest is reduced to a third. If, again, the testator has two sons, the legacy is a third of the estate, and if three, it is a fourth. The general rule is that the legatee should be added to the other heirs and treated as one of them, if they are all entitled to share equally in the inheritance; while if their shares differ, the shares of some being more and of others less, he ranks with the weakest of them or the one whose share is the least, unless the testator has expressly said that his share is to be equal to that of the highest, in which case effect must be given to the terms of the bequest. Further, if the testator should have said like the share of my daughter, the legatee according to "us" is entitled to a half when there is no other heir besides the daughter, but his share is reduced to a third if she refuses her consent to the full legacy, because according to our doctrine daughters inherit the whole estate to the exclusion of the *asabâh* or agnates and the legatee thus becomes like a third daughter."

"If a person having three half sisters by the mother and three half brothers by the father, should bequeath to a stranger the like of the portion of one of his heirs, the legatee is to be treated as one of the sisters, and so to receive one share out of ten parts into which the estate must be divided, while the half sisters take three and the half brothers the remaining six conformably to the rules of intestate succession. If, again, the testator having a wife and daughter bequeathes the like of the share of the daughter and the heirs assent, the legatee is entitled to seven parts of the estate, the daughter to as many, and

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the wife to two, the whole being divisible in such a case into sixteen portions. Nevertheless it would be more proper to say in this case that the wife is entitled to no more than one part out of fifteen, that being the number of shares into which the estate should be divided. If again a person having four wives and a daughter should say, 'like the share of one of them,' the division of the estate would be into thirty-two portions, whereof an eighth or four shares would be equally divided among the wives, the legatee would take one share like one of them and the remaining twenty-seven would pass to the daughter."

"If a person should bequeath to a stranger 'the portion of his child,' the bequest according to some is void because it is a bequest of what belongs to another, but it is more agreeable in principle to say that the bequest is valid and should be construed in the same way as if it were the *like* to his share.[1] If, again, the testator having a son who afterwards becomes his murderer should bequeath the like to his share, here though some say that the bequest is invalid yet it is more in conformity with the principles of law to say that it is invalid."

"When a person has bequeathed the double of his child's portion, the legatee has two equivalents of the portion and if he were to say *zuafan* (in the dual) or two doubles of it, the legatee would have an equivalent to four portions, but only to three according to some whose opinion is preferred as being more certain; and the same is the law when the testator has used ths expression *zuaf-i-zuaf* or double of the double of his portion."

"When a person whose property is scattered about in different places has bequeathed a third of it to the poor,

[1] The *bequest* of a child's share to another is invalid under the Hanafi Law as being the testamentary gift of the right of another, *i. e.*, the child who can, under no circumstance be excluded from inheritance.

it is lawful to apply whatever is found in the city to the poor of the place, and even the whole of it may be lawfully expended on the poor of the testator's city and on those of them who are on the spot, without following or searching for any who are absent. According to the best authority the number of those who are to share in the gift must, however, be three or more by reason of the testator's expression being in the plural. In like manner, if he should say,—Emancipate slaves (in the plural,) it is incumbent on the executor to emancipate at least three, unless a third of the testator's estate should fall short of the object."

"When a person has bequeathed a mansion which falls down and is levelled to the ground before the testator's death, the legacy is void because the name of mansion (*dâr*) is no longer applicable to it. But this is liable to doubt."

"When a testator has said, 'Give Zaid and the poor a certain sum,' Zaid, according to some doctors, is entitled to a half but according to others only a fourth. But the first doctrine is the best supported."[1]

The acknowledgment of a debt. (Hanafi Law.)

In order to avoid the operation of the rule by which legacies over a third are reduced to the disposible quantity, recourse is usually had to the acknowledgment of a debt;

[1] These principles of the Shiah law have been given from the Sharâya illustrated from the Jawâhir. It will be noticed that throughout these doctrines, there are two divergent views running side by side. The Mohakkik, the author of the Sharâya, invariably states both the views, but gives the preference to those of his own school. The contrary views are those entertained by Shaikh Murtaza, Ibn Junaid, Mohammed ibn-i-Idrîs-i-Hilli and Ibn-i-Zuhra Halabi, (author of the *Ghunia*), who in most matters, are in advance of the patristic school of the Mohakkik. I have given these extracts from the Sharâya, in preference to clothing the old views in my own words. I have followed in the main Mr. Baillie's rendering, though I prefer for general accuracy M. Querry's French version. See Appendix VI.

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but when the acknowledgment is made on a death-bed or is not founded upon a prior actual consideration, the law treats such acknowledgment also as a simple legacy subject to reduction. "If a person," says the Hedâya, "on his death-bed say to his heirs, 'I am indebted to Zaid and you must credit what he says,' in that case the claim of Zaid to any amount not exceeding a third of the estate must be admitted although the heirs should falsify it."

NOTE I.

RULES RELATING TO WILLS BY NON-MOSLEMS.

The rules with reference to the wills of the non-Moslem subjects of Mussulman sovereigns are thus stated in the Alamgiri:—

"The will of a *zimmi* for secular purposes is valid, according to all opinions. Other than secular purposes are of four different kinds. *First*, there are purposes which are *kurbut* or a means of approach to Almighty God, both with them and with us, and bequests for such purposes are valid whether they be to a set of particular persons or not; *second*, there are purposes which are sinful both with them and with us, and bequests for these purposes are valid if they are to a set of particular persons and the bequest is a *gift without regard to the purposes;* but if the persons are not particularized the bequest is void; *third*, there are purposes which are *kurbut* with us but sinful with them, and a bequest for these purposes is valid if in favour of a set of particular persons and is a gift without regard to the purposes, while if the persons are not particularized the bequest is void; *fourth*, there are purposes which are sinful with 'us' but *kurbut* with them and bequests for these are valid, according to Abû Hanifa, whether the persons be particularized or not, but void according to the Disciples when the persons are not particularized. Thus when a *zimmi*, being a Christian or a Jew, has directed by his will that slaves be purchased and emancipated on his account, whether with or without a specification of individuals, or that a third of his property be bestowed in charity on beggars and the indigent, or expended in lighting the holy shrine or in making war against [infidel] Turks, the bequest is valid. And if a *zimmi* should bequeath a third of his property to mourners and singers the bequest is valid if they are particularized and it is a gift to them, but if they are not particularized it is void. And if the third is to be expended in sending a set of Mussulmans on pilgrimage, or building a musjid for Mussulmans, and the persons are particularised, the bequest is valid and a gift, so that they may perform the pilgrimage and erect the buildings or not as they please, but if the persons are not specified the bequest is void. If he bequeath a third of his property for the erection of a church or synagogue, or bequeath his mansion to be converted into a church or synagogue, the bequest according to the Disciples is void unless it

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is for a particular class of persons when it is a gift to them; but according to Abû Hanifa it is valid under all circumstances. This, however, say 'our Shaikhs,' is only when the erection is in the villages not in towns, the bequest in the latter case being inoperative."

"When an alien, who is a *mustâmin,* makes a bequest to a Moslem or a *zimmi*, it is valid for the whole of his property, unless his heir had come into the *Dâr-ul-Islam* or Mussulman territory with him, and in that case the bequest as to the excess over a third is dependent on the assent of the heir. But if he has no heir, it is valid as to the whole of his property in the same way as the will of a Moslem or *zimmi* is valid in the like case. So also though he has an heir in the foreign country. If he has bequeathed only a part of his property, the remainder is to be given to his foreign heir. If a *zimmi* bequeathes more than a third of his property or makes a bequest to one of his heirs, it is not valid as in the case of a similar bequest by a Moslem. But if he bequeath to a person of a different religion it is valid as in the case of inheritance. If, however, the bequest is to an alien who is not a *mustâmin* it is not valid."

So also in the Hedâya:—"If a Jew or a Christian, being in sound health, build a church or a synagogue and then die, such building is an inheritance according to all our doctors, because Abû Hanifa holds an erection of this nature to be equivalent to a *wakf* or pious appropriation, which (agreeably to his tenets) is not absolute but descends to the heirs of the founder, and the two disciples on the other hand hold all such erections to be sinful in their nature whence they are of no validity (as a public foundation), and therefore descend to the heirs in the same manner as any other of the founder's property. If a Jew or Christian will that, after his death, his house shall be converted into a church or synagogue for a particular set of people, the bequest is valid according to all our doctors, and takes effect to the extent of a third of the testator's property because a bequest has two different characters—the appointment of a successor and an actual endowment and the testator is competent to do either of these."

"If a Jew or Christian will that 'his house be converted into a church or synagogue for a sect of people,' without specifying the particular sect, the bequest is valid according to Abû Hanifa. According to the two disciples, on the contrary, it is not valid, for a deed of that nature is in reality sinful, although it may appear pious to the testator; and a will for a sinful purpose is null because the execution of it would be a confirmation of sin. The argument of Abû Hanifa is that the founding of churches or synagogues is held by these persons to be an act af piety and as we are enjoined to leave them to the exercise of whatever may be agreeable to their faith the bequest is therefore lawful in conformity with their belief."

"*Objection.*—What is the difference between the building a church or synagogue in the time of health and the bequeathing it by will that Abû Hanifa should hold it inheritable in the former instance and not in the latter?"

"*Reply.*—The difference is this: that it is not the mere erecting (of the church, &c.) which extinguishes the builder's property, but the exclusive dedication of the building to the service of God, as in the case of mosques erected by Mussulmans; and as an infidel place of worship is not dedicated to God indisputably, it, therefore, still remains the property of the founder, and is consequently inheritable (in common with his other effects)—whereas a bequest, on the contrary, is used for the very purpose of destroying a right of property."

"The bequests of *zimmis* are of four kinds:—(1.) Those made for purposes held pious in their belief but not in the belief of Mussulmans, such as the building a church or a synagogue (as already mentioned) or the slaughter of hogs to feed the poor of their sect, in which cases Abû Hanifa holds the bequest to be valid in conformity with the faith of the testator, whereas the two disciples deem it invalid as being sinful. (2.) Those made for purposes held pious with Mussulmans but not with *zimmis*, such as the erection of a mosque, a pilgrimage to Mecca, or burning a lamp in a mosque, in all of which instances the bequest is invalid in conformity with the belief of the testator according to all our doctors, unless, however, it be made in favour of some particular persons in which case it is valid—as under such circumstances it is an investiture, the mention of building a mosque or so forth being considered merely in the light of a counsel—(in other words, as if the testator had bequeathed his property to particular persons counselling them therewith to erect a mosque). (3.) Those made for a purpose held pious both by Mussulmans and *zimmis*, such as burning a lamp in the holy temple (of Jerusalem), or waging war against infidel Tartars which are valid whether made in favour of specific persons or not. (4.) Those made for purposes not held pious either by *zimmis* or Mussulmans, such as the support of singers, and dissolute women—which are invalid as being of a sinful tendency—unless, however, they be made in favour of particular persons and then they are valid."

"If a *Mustâmin* bequeath the whole of his property to a Mussulman or a *zimmi*, it is valid, for a bequest of the whole of an estate is deemed illegal only as it affects the right of the testator's heirs, (whence it is that if they assent such bequest is valid); but the heirs of the *mustâmin* are possessed of no cognizable rights, they being as it were dead so far as relates to the Mussulman government because of their being in a hostile country. Besides the property of a *mustâmin* is in security only in virtue of the protection he receives from the State, which protection he enjoys in his own right, not in right of his heirs."

"If a *Mustâmin* bequeath a part of his property the bequest is executed accordingly and the remainder is transmitted to his heirs, notwithstanding they be residents in an hostile country such being the law with respect to *Mustâmins*."

"If a *Mustâmin* immediately before his death, emancipate his slave or make him a *modabbir* in the Mussulman territory, it is valid, and the

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slave is accordingly free, notwithstanding his value exceed a third of his master's estate, for a bequest beyond a third of the property is deemed illegal only as it affects the right of the testator's heirs, but a *Mustâmin's* heirs possess no cognizable right as was already mentioned."

"If a Mussulman or *zimmi* make a will in favour of a *Mustâmin* it is valid, for a *Mustâmin* so long as he resides in a Mussulman country is considered in the light of a *zimmi* and as the exercise of generosity and benevolence in favour of such is therefore allowed to Mussulmans during life, it is also permitted them to extend such acts to a period after their death. (It is related by Abû Hanifa and Abû Yusuf that they held wills in favour of *Mustâmins* to be illegal because of their intention to return to their own country, and also because the Mussulmans not only allow this but even do not suffer them to reside in their dominions, more than a year unless they submit to the payment of the capitation tax. The former is, however, the better opinion.)"

"If a *zimmi* bequeath more than a third of his estate to a stranger or to an heir, it is not valid as being contrary to the laws of the Mussulmans to which they have agreed to conform with respect to all temporal concerns."

"If a *zimmi* make a will in favour of an infidel of a different persuasion it is valid, because of the analogy of legacies to succession by inheritance, all the different descriptions of those persons who disbelieve in the true faith being considered as of one class."

"If a *zimmi* residing in the Mussulman territory make a will in favour of a hostile infidel, it is not valid, for as inheritance does not obtain between them because of the difference of country, it follows that a bequest from the one to the other is of no effect, bequest being similar to inheritance." See also the Radd-ul-Muhtâr, V, p. 683.

NOTE II.

ACKNOWLEDGMENTS BY A SICK PERSON.

"If a sick person make an acknowledgment of debt in favour of a strange woman or make a bequest in her favour or bestow a gift upon her and afterwards marry her and then die, the acknowledgment is valid, but the bequest or gift is void, for the nullity of an acknowledgment in favour of an heir depends on the person having been an heir at the time of making it, whereas the nullity of a bequest in favour of an heir depends on the legatee being so at the time of the testator's death as has been already explained, and as the woman was not an heir at the time of the acknowledgment, but had become so [by marriage] at the time of the testator's death the acknowledgment is therefore valid, but the bequest is void and so likewise the gift, it being subject to the same rule as the bequest."

"If a sick person make an acknowledgment of debt due by him to his son or make a bequest in his favour or bestow a gift upon him at a time when the son was a Christian, and he [the son] afterwards, previous to his father's death, became a Mussulman, all those deeds of acknowledgment, gift or bequest are void, the bequest and the gift, because of the son being an heir at the death of his father as above explained; and the acknowledgment, because, although the son on account of the bar (namely, difference of religion) was not an heir at the time of making it still the cause of inheritance (namely, consanguinity) did then exist, which throws an imputation on the father as it engenders a suspicion that he may have made a false declaration in order to secure the descent of part of his fortune to his son. It is different in the case of marriage as above stated, for there the cause of inheritance (namely, marriage) occurred posterior to the acknowledgment and had no existence previous thereto, for supposing the marriage to have existed at the period of making the acknowledgment, and that the wife, being then a Christian, should afterwards, before the husband's death, become a Mussulman, in that case [the acknowledgment] would not be valid."

CHAPTER XVIII.

WHAT MAY BE DEVISED.

Lecture XIV.

Anything, moveable or immoveable, over which the right of property may be exercised or which may form the subject of exchange or barter, or a fractional share thereof, or the usufruct of a thing, may be lawfully disposed by will.

Shiah Law.

The Sharâya says :—" A bequest may be either of the substance or the usufruct of a thing, but with regard to both, it is indispensable that they are such as can lawfully be possessed or enjoyed. Hence the bequest of wine, or a hog, or of a noisy or common dog, or of anything from which no benefit can be derived is illegal and invalid. But the bequest of trained dogs used for hunting or catching of game or for domestic purposes, such as guarding houses and watching in cornfields, is lawful."

A bequest remains valid and operative though the subject-matter should undergo a change or improvement after the constitution of the will; unless the alteration is so substantial as to give rise to the presumption that the testator, in making such change or improvement, intended revocation.

In the same way, the legatee bears any loss or deterioration to which the property may have been subjected during the interval. Should any encumbrance have been created by the testator upon the property, the legatee will receive it subject to the same. Where a piece of land has been left to a person by *wasiut* and subsequent

thereto a building is erected upon it by the testator, the rule is that the land should, upon the decease of the testator, go to the legatee, and the house to the heir; both being co-proprietors with regard to their respective rights.

If the testator, instead of building on the land bequeathed by him, pulls down the existing structures, houses, sheds, &c., the legatee will receive the land devoid of any erection. But if a building is bequeathed, and is pulled down subsequently by the testator, the legacy is adeemed and the *wasiut* becomes annulled *ipso facto*.[1]

The legacy of even a lawful object is void, if it is made on condition that the legatee should commit an unlawful act, for example, that he should set fire to any building or kill somebody, or prevent a person from going on a pilgrimage. When any property forms the subject of a *hiba* to which operation has been given it cannot be bequeathed.

A testator, as we have pointed out before, has the power to dispose by will not more than a third of the property belonging to him at the time of his death. This is an invariable rule fixed by the *Hadîs*, and there is a general consensus of opinion on the point among the jurists of the various schools. The author of the Multeka, the Hedâya and the Minhâj-ut-Tâlebin have laid down the principle in distinct terms, and the Mohakkik enunciates the rule as follows:—"Further legacies, whether of substance or of usufruct, are restricted to one-third of the testator's estate, and if the whole of his bequests should exceed that amount they are void as to the excess, unless allowed by the heirs. The third of a testator's property, and consequently the extent to which he may lawfully bequeath out of it, is determined by its state at the time of his death, and

Shiah Law.

[1] Sharâya.

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not by its state at the time of making the will. So that if a person, who was in good circumstances at the time of making his will, should be indigent at the time of his death, no regard is to be paid to his previous wealth in determining the amount of his valid bequests. In like manner, if he were poor at the time of making his will, and has become opulent at the time of his death, it is his latter condition, and not the former, that must determine the legal amount of his legacies."[1]

And these principles have been repeatedly affirmed by the courts of justice in this country. One difference, however, between the various schools is worthy of note. Under the Hanafi law, when a man having no heirs, bequeathes his whole estate, the bequest is valid, and there is no need of assent on the part of the *bait-ul-mâl* or public treasury, though it is the *ultimus hæres*. According to the Mâliki and the Shâfeï doctrines there is no power of constituting a universal legatee. Under the Shiah law the rule is the same.

Construction of bequests.

When the bequest is of a specific sum of money and the testator leaves actual property and outstanding debts due to him, the legacy is to be paid immediately, if it do not exceed a third of his assets; but if it exceed a third, one-third is to be delivered to him, and as the debts come in he is entitled to take a third out of every payment until his legacy is paid in full.[2]

When two legacies left to the same person.

Mâliki doctrine.

Supposing the testator leaves two legacies to the same person, would both of them take effect? Khalil ibn Ishák says both legacies would take effect if they are composed of different things, provided they do not together exceed a third of the estate, but if they are not different either in quantity or number, the last legacy will take effect. So

[1] Sharâya, p. 248.

[2] Radd-ul-Muhtâr, V, p. 660; See Appendix, VII.

also the Alamgiri:—"When a person has said, 'a sixth of my property to such an one,' and then says at the same or a different meeting, 'a third of my property to him,' and the heirs consent, he is entitled to a third of the property, that is, to no more than a third, though they consent, because the sixth is comprehended in the third, whether it precedes or follows. And if a person should say, 'a sixth of my property to such an one' and then say at the same or another meeting, 'a sixth of my property to such an one' he would have only one-sixth unless there is evidence that another sixth was intended.'"[1]

If a person were to bequeath a particular or determinate share of his estate and effects, reference would be made to what he leaves at his death, and not to his possession at the time of the bequest. But where a specific property or a determinate share thereof is bequeathed, *e. g.*, a third of the testator's flock, and the flock is destroyed before his death, the legacy falls to the ground. For, where the *wasiut* was respecting a particular share in a particular flock, the non-existence of that flock destroys the legacy, even though he may have acquired other flocks afterwards. But if he was not possessed of any flock at the time of the bequest, and subsequently acquired one, according to the approved doctrines, the legacy would take effect, for the legacy being demonstrative, effect should be given to it when the objects, from which the legacy should be paid, come into existence after the bequest.[2] If the testator were, however, to say, "my executors shall give to so and so a sheep out of my property," and there are no sheep belonging to the testator at the time of his death, the value of a sheep would be given to the legatee. But if he had said, "my executors

[1] Comp. the Radd, p. 660.
[2] *Ibid.*

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shall give Zaid a sheep out of my flock," and he died without leaving any flock, the legacy would be void. This rule applies to all kinds of property.[1]

It often happens, as pointed out already, that the testator, instead of leaving a legacy to a grandchild, simply provides by will that he should take a son's share in his

[1] "When a man who bequeathes a third of his property has no property at the time of the bequest, the legatee is entitled to a third of whatever he may be possessed of at the time of his death. But if the bequest be specific or of some particular kind of property, as a third of his flocks and they all perish before his death, the legacy is void insomuch that if he should afterwards become possessed of other flocks, or another specific thing of the same kind the right of the legatee would not attach to the subsequent acquisition, yet if he had no flocks at the date of the bequest but afterwards acquires them and then dies, the bequest is valid. And if he should say 'a sheep from my property' and have none, the value of a sheep must be given. If the bequest were only of a sheep without the addition of words referring it to his property, the bequest, according to some would be valid, while according to others it would be invalid. But if the expression were 'a sheep from my flocks' and the testator had no flocks there is no doubt that the bequest would be void. And in like manner with regard to other kinds of property such as cows, camels and the like. When a person says, 'I have bequeathed to thee a sheep from my property,' the bequest is not confined to the sheep, that he may have at his death, but applies to the sheep, that may be among his property at his death, and since this is the case if the testator should afterwards die leaving property comprehending sheep with other things, the heirs are at liberty to give one of the sheep or its value. There is nothing in the books as to the sheep's being of the best, worst or medium quality, but according to a report of Husn-bin-Ziad, the companions (of the Prophet) were of opinion that the heirs might in such a case either give a sheep of medium quality or its value. When a person says, 'My roan Turkish horse is a bequest to such an one,' these words are held to refer to a horse then in his possession, not to one which he may afterwards acquire. So also, if the expressions were 'my blind slave or my Sindian or Abyssinian slave'; while if the terms of the bequest were only 'my slave to such an one' or 'my Turkish horse to such an one' without further addition or qualification it would include his property, at the time and his subsequent acquisitions."

"When a person says, 'This cow for such an one,' according to Abû Nusr the heirs would have no right to give its value, but if it were bequeathed to the poor it would be lawful for them to bestow its value in charity;" Baillie, p. 646.

inheritance. Supposing then the testator leaves a son as his only heir, and the son consents, the inheritance will be divided between him and the grandson equally; otherwise the legatee would take one-third and the son two-thirds. But if there be two sons, the assent of the sons is not necessary, and the property is divided in equal shares among the sons and the grandson. Similarly, if there be four sons and a grandson, and the testator leave a son's share to the grandson, he takes a fifth. If a testator leave a wife, two sons and a daughter, and a grandson by a predeceased son, and will that the grandson should take a son's share in his inheritance, the division would be made in the following way:— LECTURE XIV.

Wife $= \frac{1}{8}$
Daughter $= \frac{1}{8}$
Each son $= \frac{1}{4}$
Grandson $= \frac{1}{4}$

If there had been only one son, the wife would have taken

$= \frac{1}{12}$
Son $= \frac{7}{18}$
Daughter $= \frac{7}{36}$
Grandson $= \frac{4}{12}$

Total $= \frac{36}{36} = 1.$

We have seen, already, that when there are several legacies, all of the same degree of importance, which together exceed a third, according to the Sunni Law, all of them suffer a proportionate abatement. This is a general rule, subject however, to the exception that when the bequests are for the accomplishment of religious duties or pious purposes, they must be given effect to in their entirety in the following order:— Sunni Law.

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(1) for purification;

(2) for prayers;

(3) for alms;

(4) for fasting; and

(5) for pilgrimage.

This exception applies equally to works of a religious and pious character, though not of the same degree of importance as the fundamental religious practices. These works have to be carried into effect before the payment of legacies to individuals, and they are classified as follows:—

(1) Ransoming of prisoners.

(2) Emancipation of slaves to whom freedom has been promised by the testator.

(3) The payment of the dower due to the woman whom the testator marries in his last illness and consummates the marriage.

(4) The payment of the *zakât*.

(5) The payment of the *zakât-i-fitr* and *uzzha* (Îd and Bairam festivals).

(6) The expiation for *zihâr*.

(7) The expiation due for a vow.

(8) Expiation due for the non-observance of the obligatory fast.

(9) Emancipation of slaves.

(10) Performance of the non-obligatory pilgrimage.

The Radd-ul-Muhtâr has the following on this subject:—It should be remembered that bequests are necessarily of two kinds, either entirely in favour of Almighty God, or for His servants, or for both jointly, and it is laid down that bequests in favour of Almighty God should have precedence over all others, for the legatee is One, but when the legatees are several, there is no precedence for one over the other. Therefore, when a bequest is for

human beings, no legatee can be preferred over another. For example, if a person make a bequest of one-third to one person, and then to another, both bequests would take effect, unless it is distinctly specified that either of them has preference over the other, or where it is a *muhâbât* or emancipation. But when a bequest is in favour of Almighty God, if all the directions are (1) for the performance of that which is *farz* (absolutely obligatory duties) as *zakât* or *hajj;* (2) or for the performance of duties which are simply obligatory, such as the payment of expiations, fulfilment of vows, the Fitr alms; (3) or for the performance of *nafliat*, such as non-obligatory pilgrimage and alms to the poor,—then commencement should be made with that which the testator directed should be performed first; but if they are all mixed together, then commencement should be made with those which are absolutely obligatory, whether the testator mentioned them first or not; then with the *wâjibât*, the simply obligatory, and the third will be applied proportionately in fulfilment of the testator's last wishes ...... Consequently, if a man were to say that a third of his property should be applied to defray the expenses of *hajj*, *zakât*, expiations and of Zaid the third will be divided into four shares, Zaid will get one share and the remaining three shares will be applied to the three purposes respectively. But if the person for whom the legacy is intended is not specified such as the poor, there will not be a division into four shares for all belongs to God, and the most obligatory duties will be discharged first.[1] According to the Shiah law

Shiah law.

[1] See the Alamgiri, VI, pp. 177-178, where also the question is fully discussed. "When the legacies have been added up," says the Fatâwa-i-Alamgiri, "and the third of the estate is sufficient to meet them all, they are all to be paid out of it, whether they be bequests to Almighty God or to mankind. By bequests to Almighty God are to be understood 'bequests of approach,' or which are the means of drawing nigh to Him, such as the

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"when a person has bequeathed property for the performance of certain duties some of which were incum-

obligatory *hajj* or pilgrimage to Mecca, the *zakât*, fasting, prayers, expiations, vows, *sadkat-ul fitr* and *uzzha* non-obligatory *hajj* and fasts, the erection of musjids and the like. And by bequests to mankind are to be understood, such as bequests to Zaid, Bakr and Khâlíd. All the legacies are to be paid in like manner, when, though the third of the estate is sufficient to meet them, they are allowed by the heirs. If the third of the estate be insufficient to meet all the legacies and they are not allowed by the heirs, then it is to be considered whether they all be to Almighty God or all to mankind or some be of one class and some of the other. If they are all to Almighty God, then it is further to be considered either whether they all *furâiz*, [that is, obligatory duties], or *wâjibât*, [that is, things which though not actually obligatory are yet incumbent], or [*nawâfil* which are voluntarily assumed obligations], or whether they are partly of one kind and partly of another. When they are all equally prescribed or appointed duties, beginning is to be made with that which the testator began with; when the bequest is for *hajj* and *zakât*, a commencement is to be made with the former though it were verbally last. It has been said with regard to *hajj* and *zakât* that they both take precedence of expiations, and expiations take precedence of the *sadkat-i-fitr* (or alms of the *fitr*) and these of sacrifices, though sacrifices are also *wâjib* [or necessary] according to us. With regard to the alms in question all are agreed that they are *wâjibât*, but whether sacrifices be so is a point that is still within the province of *ijtihâd* or juridical discussion and what all are agreed about is still stronger. Thus, also, the alms of the *fitr* are preferred to expiation of the *fitr* in the month of Ramzan. And it has been said that the former have also precedence of vows, and vows of sacrifices, and these of *nawâfil* or voluntary obligations. In all this that has been said it is assumed that there are no legacies of emancipation to take effect at once during death-sickness and no emancipation dependent on death, which is *tudbîr*. If there be any such they have preference, for these emancipations do not admit of being revoked, and are therefore stronger and entitled to preference. A bequest of emancipation, if it be *wâjib* or necessary as an expiation, is like other expiations of which we have spoken already, but if they are not *wâjib* their effect is like that of spontaneous bequests to the poor, the building of musjids, voluntary pilgrimage and the like."

"When the legacies are partly to Almighty God and partly to mankind, as for instance, to a class of persons, the portion of the latter is to be taken out of the third and to be divided among them without preference of any over the others and with regard to the portion of Almighty God it is to be applied first to *furâiz*, next to *wâjibât* and then to *nawâfil*. And if with the legacies to Almighty God there is a legacy to one person in

bent on the testator and others only discretionary, they are all to be carried into effect if a third of his estate be sufficient for the purpose." If the third be not sufficient and the heirs should refuse their consent, those duties that were incumbent on the testator must first be discharged out of the general mass of his estate and then the others out of a third of what remains, beginning with the first mentioned by the testator and so on in order. If none of the duties are of an incumbent nature but merely optional, they can take effect only to the extent of a third of the estate, and are to be discharged beginning with the first mentioned by the testator and so on in order until the third is exhausted.

particular, each of the kinds of approach is to be treated as single. Thus if one were to say, 'A third of my property in *hajj*, *zakât*, expiations and to Zaid,' the third would be divided into four portions—one for Zaid, one for *hajj*, one for *zakât* and one for expiations."

"When all the legacies are to mankind, preference is to be given to the strongest, so that if there be among them an emancipation to take effect immediately, it is to have the precedence; but if all are equal in strength, each is to rank for its amount against the third of the property without any regard to the order in which they may have been mentioned by the deceased."

CHAPTER XIX.

Section I.

THE LEGAL EFFECT OF A WASIUT.

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Wasiut is defined as the conferment of a right of property (*tamlîk*) in a specific thing or in a profit or advantage, to take effect after the death of the testator. "It is proper for a man to make a will when there is no right against him on the part of Almighty God, but it is an incumbent duty to do so when there is such a right, as for instance, when he has omitted to pay his *zakât*, or to fast, or to perform the *hajj* or pilgrimage to Mecca, or to say the prescribed prayers."

Any expression which signifies the intention of the testator is sufficient for the purpose of constituting a bequest. Examples of this are given in detail in the Alamgiri[1] :—

"When a person has said, 'this my slave to such an one, and this my mansion to such an one,' without using the word bequest, and there is no mention of bequests nor of the words 'after my death,' the expressions constitute a gift both by analogy and on a favourable construction, and if possession be taken during the life of the donor the gift is valid, but if possession is not taken of it till after his death the gift is void. If a person should say, 'I have bequeathed that a third of my mansion be given to such an one after my death,' this is a bequest

[1] Alamgiri, VI, p. 145.

and possession during the lifetime of the testator is unnecessary. So also when one, whether in sickness or in health, has said, 'if any event should happen to me, then such thing to such person' this is a legacy, death being understood by 'us,' as the event alluded to. So also if he should say, 'to such an one a thousand dirhems from my third,' this would be a bequest though no allusion is made to death. But if the words were 'to such an one from my property,' or 'from the half' or 'the fourth of my property,' they would be of no effect unless uttered in connection with bequests in which case they would constitute a legacy. When a person has said, 'if I die on this my journey, to such an one there is against me a debt of a thousand dirhems,' it is a bequest out of his third."

Shiah law. Ambiguous legacies.

Under the Shiah law there are certain rules relative to ambiguous legacies, which are deserving of notice, though in their application they will need some modification in view of the different conditions of society prevailing in our time :—

"When a person has bequeathed a *juzz*, or part of his property, there are two traditions as to the proper interpretation of his words. Of these, the most authentic assigns a tenth of the testator's estate to the legatee; but according to the other, he should receive only a seventh of the third. If, again, he should bequeath a "*saham*," or share, the proper interpretation is an eighth; while if it were a *shai*, or a thing, it should be interpreted as meaning a sixth."

"If a person should make a bequest for several purposes, of which the executor has forgotten one or more, he should dispose of it in some good or proper way, although some of our lawyers have expressed an opinion that it should fall back into the deceased's inheritance."

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"If a person should bequeath a particular sword which is in a scabbard, the scabbard and mounting or ornaments are included in the bequest. In like manner, if a person should bequeath a box containing clothes, or a boat or vessel which has merchandise on board, or a bag containing linen, in all these cases, the things actually bequeathed, and the other things contained in them, are included in the legacy. Some jurists, however, hold another view, though it does not deserve much consideration."

"If a person should make a will excluding some of his children from their share in his succession, the exclusion is not valid. But whether his words are to be treated as entirely inoperative is a question on which there are two opinions. According to one of these, they are quite futile and of no efficacy whatever; but, according to the other, the same effect should be given to them as in the case of the bequest of the whole of a person's estate to a stranger, excluding his heirs, when the bequest is valid as far as a third of his property, and the heirs have their legal portion the remaining two-thirds. The first opinion, however, appears to be better founded in law, though the other is supported by a tradition which is now rejected."

"If a person should make a bequest in terms so ambiguous that the law affords no interpretation of them, it must be left to the heir to explain them as he may think proper."

"It is preferable that legacies should be kept below a third of the testator's property, and consequently the bequest of a fourth is better than that of a third and of a fifth better than of a fourth."

"In cases of ambiguous legacies, like the preceding, if the legatee should demand any particular thing as being conveyed in the testator's meaning, the statement of the

heir would be preferred. If the legatee should still insist upon it, the heir would be required to confirm his statement by his oath not otherwise."

Section II.

THE REVOCATION OF WILLS.

Revocation of wills.

A will is essentially revocable in its nature. It may be revoked at any time, even during the last illness of the testator.

Revocation may be either express or implied, made either directly or indirectly. It is express when the testator revokes the *wasiut* in express terms. It is implied or indirect when the testator indicates by his conduct or his subsequent acts that he does not intend to maintain the legacy.[1] "Every act the effect of which is to extinguish the proprietary right in any property, when committed by a testator in respect of the subject of a bequest, causes revocation; and in like manner every act of the testator which occasions an addition to the subject of a bequest, when it cannot be delivered without the addition, has the effect of revoking it; similarly any disposition subsequently made to which operation is given has also that effect."[2]

The different modes in which revocation may be effected.

As regards the mode and capability of revocation, bequests are usually divided into four categories; the first

[1] Sometimes the attempt to convey may have the effect of revoking a devise though owing to some want of formality the conveyance itself may not take effect. But where the conveyance is initially invalid, for example, when it has been executed by a person who was under an incapacity it will not act as a revocation.

[2] Alamgiri, VI, p. 143; Baillie, p. 628; Radd-ul-Muhtâr, V, p. 647.

can be revoked either in express terms or by implication, *i. e.*, by conduct. The second kind may be revoked only by express words. The third by conduct only; and the fourth cannot be revoked at all. The first kind of bequests consists of specific legacies which can be revoked by an express declaration of the testator to that effect, or by his selling or transferring the subject of the bequest in such a manner as to place it beyond his power to cancel or reverse the transfer. The second kind of bequest is where the testator bequeathes a third or fourth share of his property to any person. In such a case, the legatee is entitled to that particular share in any property which might be left by the testator at the time of his death, and consequently unless a revocation of the bequest is made in express terms, the legacy will take effect. The third kind of bequest is qualified emancipation which can be withdrawn only by express conduct. The fourth kind of *wasiut*, which cannot be cancelled either expressly or impliedly, is absolute emancipation.

According to Abû Hanifa, whose opinion is law, a mere change in the shape of an article effected at the instance of the testator does not amount to a revocation. For example, if a person were to bequeath to another a piece of silver which he subsequently made into a ring, this is not a revocation of the bequest according to Abû Hanifa, though according to Abû Yusuf and apparently Mohammed it would be so. If a person should sell a specific thing which he had bequeathed and then repurchase it, or make a present of it and then revoke the gift the bequest would continue valid. "The slaughter of a bequeathed sheep is the revocation of a bequest of it, but the washing of a bequeathed garment is not so." The mere denial of a bequest does not, according to Abû Yusuf, amount to a revocation, but Mohammed holds a

different view. If the testator were to say the legacy left by him to A or B was void, it would have the effect of revoking the will though it would not be so, if he merely said it was unlawful *(harâm)* or usurious.

If a testator were to devise a specific thing to A. and afterwards to B., the subsequent devise does not necessarily avoid the first. If it appears from the phraseology used or otherwise, that the intention of the testator was to give the subject of the bequest to both legatees jointly, effect will be given to such intention.[1] But if it appears that the intention was to give the legacy to the second legatee by cancelling the first bequest, it would amount to revocation. The general rule, however, is that the last legacy takes effect.[2]

If the second legatee were dead at the time when the subsequent bequest was purported to be made, the first bequest would remain valid by reason of the second being void, while if the second person were living at the time when the bequest was made and should subsequently die before the testator, both legacies would be void and the subject of the bequest would revert to the heirs of the testator.

Under the Hanafi law the pledging of a property will not avoid the bequest,[3] for it does not extinguish the right of the proprietor in the subject of the pledge; the right of the testator to redeem would devolve on his death to the legatee; in other words the legatee takes the devised property *cum onere*.[4] But the testator may, whilst

[1] Alamgiri, VI, p. 144.

[2] Radd-ul-Muhtâr, V, pp. 657, 658.

[3] According to the Alamgiri the pledge of a slave already bequeathed amounts to a revocation; but this effect is restricted to the special kinds of property analogous to the property referred to here.

[4] This is different from the English law when the legatee, unless a contrary intention appeared, was entitled to have the estate disencumbered out of the personal estate of the testator not specifically bequeathed.

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creating the mortgage, use terms expressly from which a distinct revocation of the previous devise may be clear.

If one should bequeath a mansion and then white-wash it or pull it down, that would not amount to a revocation, but if he were to plaster it over with earth, that would be a revocation if done "largely." If he should bequeath land and sow it with vegetables that would not be a revocation, while if he makes a vineyard of it or plants trees on it, the bequest would be revoked according to Kazi Khan.[1]

Shiah doctrines.

Similarly, under the Mâliki and Shâfeï law, among the various acts by which a *wasiut* is indirectly revoked are the sale and gift of the subject of the bequest.

The Mohakkik gives the Shiah principles in these terms :—

"A *wasiut* is an *akd jâiz* on the part of the testator whether it be [the bequest] of property or the nomination of a *wali ;* and it may be revoked during his lifetime either by express language or by any act which ignores or contradicts the *wasiut*. Thus, if the testator should sell the subject of the bequest or by another will direct it to be sold or should bestow it in gift putting the donee in possession of it or should pledge it, every such act would amount to a revocation. In like manner, if he should make such a use of it that it could no longer be called by the same name ; as for instance, if he had made a bequest of grain and afterwards ground it into flour or meal, or a bequest of flour or meal and then converted it into leaven or bread, this would be a revocation of the bequest. Further, if a person should bequeath a quantity of oil and afterwards mix it with some of a better quality, or of grain and then mix it with some of another species so as

[1] See Appendix VIII.

to remove the possibility of distinguishing and separating one from the other, that likewise would be equivalent to a retractation of the bequest. Whereas if he should make a bequest of bread and subsequently break it into crumbs there would be no revocation of the legacy."[1]

The acceptance of a legacy.

The validity of a *wasiut* is submitted to another formality, namely, the implied or express acceptance of the *wasiut* by the legatee. "The acceptance of a bequest," says the Mâliki lawyer, "is a necessary condition;" and the Hanafi jurist lays down that "in default of acceptance a *wasiut* is null." Similarly, under the Shiah Law the acceptance of the legatee is required to vest the legacy in him. But there is considerable divergence between the Shiah school on one side and the Hanafi on the other regarding the period when the acceptance should be made.

Shiah doctrines.

According to the Shiah doctrines an acceptance *before* the death of the testator is lawful, though it is discretionary with the legatee. An acceptance *after* the testator's death is conclusive, even though it should be delayed for some time after the occurrence of that event, provided there was no rejection on the part of the legatee after the testator's decease and before acceptance. But when the rejection was during the lifetime of the testator, the legacy may still be accepted after his death, as such a rejection has no effect in law. But if rejected after his death without having been accepted, the legacy is cancelled. A *wasiut* would similarly be cancelled if rejected by the legatee even though possession had been actually taken, provided there was no acceptance. Where there has been no possession, but the legacy is rejected after the testator's death as well as the legatee's prior acceptance, it is cancelled, according to some of the jurists, while

[1] Sharâya, p. 247.

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others maintain that it is not, and this opinion is more approved. If, however, there has been both acceptance and possession and the legacy is subsequently rejected, there is no doubt that the rejection is ineffectual and the legacy is not cancelled according to all the jurists, because the right of property has then become already established in the legatee.

If a legatee should reject part of a bequest and accept the remainder, such partial acceptance would be valid and his right established to that extent. If a legatee should die before acceptance, his heirs take his place and may accept the bequest.[1]

Hanafi doctrines.

According to the Hanafi Law an acceptance before the death of the testator is of no effect. The bequest may be accepted either expressly or by implication. If the legatee died before expressing either rejection or acceptance of the bequest, his death becomes, and would be presumed to amount to, an acceptance and his heirs would inherit the legacy. There is this difference between a testate and intestate succession,—that an heir enters upon the possession of inherited property without acceptance, but a legatee does not enter upon the possession of bequeathed property without acceptance. The acceptance of a bequest must be made *after* the death of the testator insomuch that if it be accepted or rejected during his life either act is void and the rejector is still at liberty to accept after the testator's death.

The legal effect of a bequest is to confer on the legatee a new right of property in the same way as in the case of a gift, and the bequest becomes vested in him by acceptance, so that if he accept after the death of the testator his ownership of the thing bequeathed is established, whether he take possession of it or not; and if he rejects the be-

[1] Jawâhir-ul-Kalâm.

quest it is cancelled. But when a bequest is made to a body of people such as the poor, or is in favour of a religious or pious purpose, the acceptance of the legatee is presumed.

SECTION III.

THE WASIUT OF USUFRUCT OF LANDS, GARDENS, HOUSES, TREES, &c.[1]

As pointed out already there is no rule against perpetuities under the Mahommedan Law. So long as commencement is made, in the case of a settlement or devise, with a life in being, it is not necessary that the persons who take the remainder should be in existence.

Accordingly, one may lawfully bequeath to another, for a limited period or in perpetuity, the produce *(ghallat)*[2] of lands and gardens, the rent or occupancy of a house, the use of animals or trees, the service or earnings of a slave, &c.

If the term for which the bequest is made is indefinite, it will be regarded as made in perpetuity.[3]

The effect of such a bequest is to *detain* the subject thereof in the ownership of the testator's heirs and to give to the legatee only the right to take its profits

[1] The title of this chapter in the Alamgiri (Vol. VI, 188), furnishes a sufficient indication to the scope of the provisions of the Arabian Law regarding the bequests of usufruct:

فی الوصیة بالسکنی والخدمة والثمرة ، غلة العبید وغلة البستان وغلة الارض وظهر الدابة وغیرها

See also, Radd-ul-Muhtâr, V, p. 678.

[2] Radd-ul-Muhtâr, V, p. 677. See also 4 Hed. Ch. V, Bk. II, p. 527; the term *ghallat* is a generic expression and includes produce, rent, income, profits of all kinds, the service of slaves, &c.; Jâma-ul-Lughat.

[3] Radd-ul-Muhtâr, V, p. 679.

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"in the same way as a person in whose favour a *wakf* has been made."

The bequest may be for a particular year, *e. g.*, the year of the Hegira 460. If the year is past at the time of the testator's death, the bequest is void. If a portion only of the year has expired, it will take effect with respect to the unexpired portion.

If the subject of the bequest falls within the third of the testator's estate, its usufruct will be given to the legatee, in accordance with the use thereof provided in the *wasiut*. For example, if the bequest is of the right of occupancy of a house, and the house falls within the disposible one-third, it will be made over to the legatee for use and occupation.[1] If the rents and profits of the house alone are bequeathed, the legatee will get the same but will not be entitled to occupy it. If the subject of the bequest exceeds the third, the legatee will get the benefit of that portion which is covered by the third. Where the bequest is of the use of some property which is in its nature impartible, the legatee will have the right to its service or use for one period and the heirs for double that period. The example given in the Alamgiri of a slave explains this principle thoroughly :—

"If the slave does not come within a third of the property he is to serve the legatee for one day and the heirs for two days alternately, until the completion of the year, and when it has been completed he is finally to be delivered up to the heirs. If one year in particular be specified and the slave falls within a third of the property, or the legacy is allowed by the heirs, he is to be delivered up to the legatee to serve him for a whole year and then to

[1] Similarly if the *wasiut* is of the service of a slave, and the slave falls within the third, the slave will be made over to the legatee for the period fixed.

be restored to the heirs. If he does not come within a third of the property, and the legacy is not allowed by the heirs the slave is to serve the legatee for one day and the heirs for two days alternately for three years, and when the three years have passed the bequest is fulfilled by the service. If the legatee should die the slave reverts to the heirs of the testator, and if he die in the testator's lifetime the bequest is void."

If the legatee should die before the expiration of the term limited for the bequest, the subject of the legacy would immediately revert to the heirs of the testator. If the legatee dies during the lifetime of the testator the bequest at once falls to the ground. The testator may bequeath the usufruct of a thing to one person and the *corpus* to another; and if the subject of the bequest falls within the disposible third, each legatee is entitled to his particular bequest. And if the bequest of the usufruct is *absolute*, the legatee is entitled to hold possession of the subject till his death, after which it is to be transferred to the legatee of the *corpus* if he be alive; if not, it is to be transferred to the heirs of the testator.[1]

When the bequest is of the rents and profits of a house and the legatee wishes to occupy it himself he cannot lawfully do so.[2] "If the bequest be of the occupancy of a mansion and there is no property besides, the legatee may occupy a third of the mansion and the heirs have no right to sell the two-thirds of the mansion in their possession.[3] Neither is the legatee of the occupancy of a house en-

[1] Radd-ul-Muhtâr, V, p. 679.

[2] Radd-ul-Muhtâr, V, p. 679. According to Allâmah Sharniblâlieh, there seems to be some difference of opinion on this point, and he himself upholds its validity.

[3] According to the Zâhir-ur-Rawâyet, the heirs are not entitled to sell the two-thirds share allotted to them, for that would be prejudicing the interest of the usufructuary legatee. Abû Yusuf seems to think such

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titled to let it,[1] nor to remove the slave whose services are bequeathed from the testator's place of residence to another, unless the legatee and his family *(ahl)* are in the latter place when the slave may be taken there for the purpose of serving them."[2] The reason of this decision is, that the bequest must take effect and be executed in conformity with the intent of the testator and in a case where the family of the legatee reside in the same place with the testator, his intention is that the legatee shall avail himself of the service in that place, but where the legatee resides in a different city, the testator's intention must be presumed to be that the legatee should have the slave's services there.

When the occupancy of a house is bequeathed to a person without any limit of time, he is entitled to it as long as he lives. And when the income is bequeathed, if the house falls within a third, though the income may exceed the same, still it would be valid. Similarly, with regard to the earnings of a slave, or the produce of the testator's garden or anything else. When a bequest is of a slave to serve the legatee until he can do without those services,—if the legatee is a child, the service is to continue till he is of age; if he is adult and poor the service is to continue until he is able to buy a slave to serve him; but if he is adult and rich the legacy is void.[3]

If a person leave one year's earnings of his slave or income of his house to another, and he have no other property except such house or slave, the legatee in that case

sale lawful. The doctrine in the Zâhir-ur-Rawâyet is more approved. "Besides," says the Hedâya, "the legatee has a controlling power over the heirs with respect to their portions, so far as to restrain them from executing any deed which may injure his share."

[1] According to the Shâfeïs he is entitled to do so.

[2] Radd, V, p. 680.

[3] This is according to the Alamgiri.

receives one-third of a year's earnings or income, because such income, as being property, is capable of division. But the legatee cannot require the heirs to make a partition of the house in order that he may himself collect the rent of his own share, (*viz.*, the third).

When the bequest is of the *produce* of the testator's garden, the legatee is entitled to the existing and the future produce. But when the bequest is of the *fruit* of his garden in perpetuity, the legatee is entitled to the fruit thereof until his death. But if the word *abad* or *for ever* is not used, and there is fruit in the garden on the day of the testator's death, the legatee is entitled to it to the extent or value of the disposible third, but he is not entitled to the future fruit, it being supposed that the intention of the testator was to give one set of fruit. But where there is no fruit in the garden on the day of the testator's death, the bequest takes effect on the fruit which comes into existence subsequent to the death of the testator but prior to that of the legatee.[1] When a bequest is of something which is an accretion to something else, the specific accretion in existence at the time of the testator's death will be given to the legatee, though the words " for ever " may have been used. This is different from the legacy of the rents and profits.[2]

If the legacy be of the third of the *income* of a house, according to Abû Yusuf, the heirs may partition the house, giving the legatee a third. If the third yields any income, the legatee gets it, while if it is not productive he has

[1] Alamgiri, VI, p. 148 ; Radd, V, p. 681 ; Hedâya, IV, p. 527.

[2] The reason of this is explained in the Radd. In the Alamgiri the rule is stated thus :—When a man has bequeathed to another the wool of his flock or their progeny or milk for ever and has then died, the legatee is entitled only to the wool that may be on their backs or the young that may be in their bellies, or the milk that may be in their udders—whether he say " for ever or not."

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nothing. The heirs may also sell him their two-thirds, whether before or after the partition.

When the bequest is of the *produce* of a piece of land and there are no trees upon it and no other property besides, the land is to be let and a third of the rent given to the legatee. If there be palm or other trees on the land, a third of the produce is to be given to him and the land, is not to be given out in *muzâribat*.[1]

When the bequest is of the produce of a garden, the legatee may purchase the garden from the heirs of the testator, but that would cancel the legacy. In like manner, if they satisfy him with something else, he may surrender his third of the produce and release them from it. So also the occupancy of a house or the service of a slave may be lawfully compounded for, though a sale to an outsider of these rights is not lawful.[2]

A bequest of the income of a house or the earnings of a slave to the poor generally is lawful, but a bequest of the occupancy of a house or of the service of a slave to the poor is not lawful unless the persons are particularized.

When a bequest is made of the principal and the accessory to two persons respectively in one and the same will, each legatee takes the legacy specifically given to him. For example, if the testator were to say, "I give this ring to so and so and the stone to so and so."

But when one of the declarations is separated from the other, though the effect is the same according to Abû Yusuf, according to Mohammed the legatee of the principal is exclusively entitled to the principal and the two legatees are partners in the accessory.

The following is important as showing how effect is to

[1] *Muzâribat* is the arrangement by which the cultivator and landlord divide the produce according to certain shares.

[2] Radd, V, p. 681.

be given to two legacies respecting the same article, one arising out of the other. "If a person should bequeath 'this slave to one and his service to another,' or 'this mansion to one and its occupancy to another,' or 'this sheep to one and its wool to another,' both persons being specified, each legatee takes what is bequeathed to him and there is no difference of opinion on this point, whether the bequests are made separately or together. But if a beginning is made in these cases with the accessory, and the principal is then bequeathed, as, for instance, if the service of the slave is first bequeathed to one person and then the slave to another, or the occupancy of a mansion to one person and the mansion itself to another, or the fruit to one and the tree to another, it is only when the bequests are made connectedly that each legatee is entitled to what has been named for him specially, for if they are mentioned separately the legatee of the principal is exclusively entitled to the principal, and the accessory belongs to them both in halves. And if a mansion is bequeathed to one person and a particular apartment in it to another, the apartment is to both in equal shares. So also if a thousand dirhems are bequeathed to one person and a hundred out of them to another, the legatee of the thousand is entitled to nine hundred exclusively, and the hundred is to be equally divided between them, and in this there is no difference of opinion."

When the bequest is of the use of the young of an animal which is unfit for service, the person in whom the right to the substance of the thing is vested is bound to maintain it. So, also, when the produce of palm-trees has been bequeathed to one person for ever, and the trees themselves, being yet immature, to another, the latter is liable for the expense of watering and tending them until they arrive at maturity and are in bearing, after which

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the liability is on the former, and when they have begun generally to bear, though they should subsequently fall off and produce nothing, the legatee of the produce would still be liable for the expense, in the same way as a legatee of service is liable for the maintenance, "both during night and day though the slave sleeps and does no work during the night."

If twenty dirhems a year are bequeathed to a person from the produce of a garden, which is sometimes more productive and sometimes less, the legatee is entitled to have a third of the produce appropriated or set aside every year, and twenty dirhems out of it applied to his maintenance so long as he lives. Similarly, if a person were to declare that A. should get a monthly sum for his support out of the testator's property, however small the allowance may be, a full third of the property must be appropriated or put aside that the legatee may obtain his monthly maintenance as directed by the testator.[1]

Rules relating to annuities.

If a testator should bequeath a third of his property to one person, five dirhems a month for maintenance to another so long as he lives, and five dirhems a month for the maintenance of a third person so long as he lives, and the heirs allow all the legacies,—the estate is to be divided, according to Abû Hanifa, into nine parts, one of which is to be given to the legatee of the third, and the remaining eight to be appropriated for the other legatees, four parts each; but, according to Abû Yusuf and Mohammed, the property is to be divided into seven parts, whereof one is to be given to the legatee of the third, and the remaining six to be appropriated for the other legatees, three for each. This principle applies to those cases where the heirs allow all the legacies. But now suppose that they do not assent, in such case

[1] Alamgiri, VI, p. 150; Radd, V, p. 680.

the division is to be into seven parts as before according to Abû Yusuf and Mohammed; but according to Abû Hanifa, the case is to be treated as if all the legatees were equally entitled to the third, which is consequently to be divided into three parts among them. Under these circumstances, if both the annuitants should die before the fund is exhausted the surplus is to revert to the legatee of the third; and if one of them should die, the surplus is to be divided and one share given to the legatee of the third and the other reserved for the survivor, according to Abû Hanifa; while according to the Disciples only a fourth is to be given to the legatee of the third and three-fourths is to be reserved for the survivor.[1]

If the testator should bequeath five dirhems a month for the maintenance of A so long as he shall live and ten dirhems a month for the maintenance of B and C so long as they shall live, (whether jointly or separately,) and the heirs allow the legacies, the property is to be divided into two equal shares, one half to be reserved for A and the other half for B and C, for A is to be considered as a legatee of the whole, and B and C are to be considered together as one legatee of the whole, so that the property is to be divided between them in halves according to all opinions; and if A should die, what remains is to be reserved for B and C and ten dirhems a month applied to their maintenance, and if one of them should die before A the share set apart for them together would be applied for his surviving co-legatee and five dirhems would be given for the latter's maintenance every month. If the heirs do not allow the legacies, a third of the property is to be divided, by general consensus, into halves, one-half of the third being set apart for A and the other half for B and C. But if a person were to bequeath out of

[1] The views of the Disciples is adopted for the *fatwa*.

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the third of his property a maintenance of four dirhems a month to A. so long as he shall live, and a maintenance of ten dirhems a month to B and C so long as they shall live, and the heirs allow both legacies, one-third of the property is to be appropriated for A and another third for B and C jointly and on the death of A, the third set apart for him, or so much thereof as is not exhausted, reverts to the heirs of the testator; and if either B or C should die, what remains of his share is to be reserved for his co-legatee, and when the other dies if anything should remain, it is to revert to the heirs. If the heirs do not allow the legacies, the third is to be divided into halves and one half of it is to be reserved for A and the other half for B and C.

According to Mohammed when a bequest is in the following terms, "I bequeath my third to be set apart for Zaid, that he may have four dirhems out of it for his maintenance every month so long as he lives, and I bequeath my two-thirds to Bakr and Amr that they two may have ten dirhems laid out for maintenance every month as long as they live," and the heirs allow the legacies, a full third of the property is to be delivered up to the first legatee in his absolute right, and the other two-thirds to be delivered to the two legatees between them in the same way, and when any of them dies his portion goes to his heirs. But if the heirs do not allow the legacies, the first legatee is to have a half of the third, and the other two legatees to have the other half. Similarly, if the bequest were as follows, "I bequeath my third to Zaid that he may have four dirhems a month out of it for his maintenance, and I make a bequest to Bakr and Amr that Bakr may have five dirhems a month out of it for his maintenance, and Amr three dirhems a month

for his maintenance," and the heirs allow the legacies, the first legatee is to take a third of the whole property, and the other two legatees to take another third between them in halves in absolute right; while if the heirs disallow the legacies, Zaid is to have half of the third and Bakr and Amr to have the other half of it between them, and the share of whoever of them may die, goes to his own heirs.

Shiah Law.

According to the Shiah Law, if a person should bequeath the service of his slave, the fruit of his garden, the residence of his house or anything else of a usufructuary nature for ever or for a fixed time, the advantage or profit to arise therefrom must be valued, and should it not exceed a third of the testator's estate the bequest is valid, while if more than a third, the legatee is to have as much as the third will cover and the legacy is void as to the excess.

When a person has bequeathed the service of his slave for a fixed period, the expense of the slave's maintenance must be defrayed by his heirs, as this is a duty which follows or is dependent on the ownership of the slave, and the legatee is entitled to no more than the service of the slave while all the other rights of ownership appertain to the heirs, as sale, manumission and the like, none of which, however, has the effect of invalidating the rights of the legatee.

NOTE.

A verbal will is valid according to all the schools and the mode of making it is indicated in the Koran, ch. V, vv. 105-107. The Sharâya declares that "wills or bequests are established in law by the testimony of two witnesses who are Muslims and just persons, or in case of necessity, when two just Muslim witnesses are not to be had, by that of two *zimmis* or infidel subjects. And in cases where property only is concerned, the testimony of one witness on oath may be received, or of one male witness and two

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females, and the testimony of even a single female witness may be received as establishing the right of a legatee to a fourth part of what she testifies to; of two women as supporting his claim to a half, of three as to three-forths and of four as to the whole. But an appointment of executors or guardians by will can be established only by the testimony of two male witnesses, and in this case the testimony of women cannot be received, nor, further, according to the most obvious analogy, can that of one male witness on his oath be received, although with respect to the latter there is some difference of opinion."

"The testimony of an executor cannot be received in matters connected with his own executorship nor as to anything from which he may derive advantage to himself or to his office. And if appointed executor for the expenditure of a specific part of his testator's property, his testimony cannot be received in favour of the deceased to prove that this property does not exceed a third of his estate." In Mahommedan countries when a will is made in the presence of witnesses the usual rule is for these witnesses to embody their dispositions on the will; subjoined is a copy of one of such depositions made in Algeria:—"We bear witness to God we were present when Salih-ibn-Rafah said to us, 'I take you as witness against my person that I bequeath to Zaid the third of my goods that I may have, the rest will be for my heirs.'" As said before, a bequest may be made in any form of expression or even by signs, which may serve to indicate the idea and intention of the testator. In this country, however, *wasiuts* are generally embodied in writing and attested by witnesses when they are called *wasiutnamahs*.

The Probate Act (Act V of 1881) applies now to the wills of Mohammedans. But where the will has not been reduced into writing no probate is necessary.

CHAPTER XX.

EXECUTORS.

Section I.

WHO MAY BE APPOINTED AS EXECUTORS.

Lecture XV.

The testator has the power of confiding the execution of his last wishes to whomsoever he likes; and subject to certain restrictions to which I shall presently call attention, the executorship may be entrusted to either a man or woman, a stranger or a relative. And though a testamentary disposition may be invalid, the appointment of the executor, so far as the guardianship of the minor children and their education are concerned, would be valid. The executor[1] is bound to carry out the wishes of the testator that are valid in law with the utmost fidelity,[2] to watch the interests of his children, and to administer to his estate and effects.

The appointment may be either limited to a special purpose or may be general.

A minor executor.

The appointment of an infant under the age of puberty or of an insane person, whether permanently so or with lucid intervals, is unlawful. But a woman, a blind person, or "one who has even undergone the specific punishment for slander," may lawfully be appointed an executor.

[1] The executor is called a *wasi* or *musa-ilehi*.

[2] Jâma-ush-Shattât; Radd and Kazi Khan *in loco*.

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When a minor has been appointed an executor, Khassâf has declared that the Kazi should remove him and appoint in his stead, as executor, another person possessed of the capacity to administer to the testator and carry his wishes into effect. Any act committed by the minor executor before his removal would not be operative, according to the generally received doctrine.[1]

Suppose, however, that the minor, before he has been removed by the judge attains his majority, would he remain executor? Abû Hanifa says not, but Abûl Kâsem has stated that he would continue to be the executor, and Mohammed and Abû Yusuf are agreed on this point.[2] A minor, though he cannot validly be appointed an executor by himself, can be associated with an adult in the office, but he cannot interfere in the administration of the estate until he has attained puberty.

Joint executors, one of whom is a minor.

When two persons are appointed executors, one of whom is a minor and the other adult, the adult executor, may act alone until the minor has arrived at puberty, but when that happens the adult executor can no longer act singly. If, however, the minor should die, or, on attaining to puberty, should prove to be of unsound judgment, the other may continue to act singly, and the judge cannot in this case force an associate on him because there is still an executor to the deceased appointed by himself. Further, whatever may have been done by the adult executor during the minority of the other, cannot be undone by the latter on his attaining puberty, unless contrary to the nature and object of the trust.

An alien infidel cannot be appointed executor.

The appointment of an executor being for the education of the testator's children, for the protection of their interests and the due execution of the testator's last wishes,

[1] Radd-ul-Muhtâr, V, p. 689; Fatâwa-i-Alamgiri, VI, p. 214.

[2] Radd-ul-Muhtâr, V, p. 687.

the law jealously provides against the appointment of an alien (infidel) as executor.[1] According to all the schools, a Moslem cannot appoint a *harbi*, an infidel subject of a hostile power, to be his executor whether such non-Moslem be a *Mustámin* or not. Such an appointment, if made, is liable to be cancelled by the Kazi. The appointment of a *zimmi*, a non-Moslem fellow-subject, is lawful but the Kazi *may* set it aside. It follows, therefore, that the appointment of a non-Moslem alien is void *ab initio*, whilst the appointment of a *zimmi* is valid until set aside by the judge. And this was the view enunciated by the Law-officers in two cases decided by the Sudder Court in 1825.

Mohammed Amin-uddin v. Mohammed Kubir-uddin.

In *Mohammed Amin-uddin and another* v. *Mohammed Kubiruddin*, (the first of these cases,) a Mussulman female had bequeathed the whole of her property to a stranger and had appointed a Hindu as the executor to her will.

Upon reference by the judges of the Sudder Court to the *Kâzi-ul-Kuzzât* and the *muftis* of the Court, they pronounced, (*a*) if the testatrix left no heirs she was at liberty to bequeath the whole of her property; (*b*) if she had heirs, the bequest of more than one-third would depend on the consent of such heirs; and *(c)* though the appointment of other than a Moslem as executor to the will of a Moslem is lawful, yet it is incumbent on the Kazi to eject him from being executor. "The reason why the appointment," added the law officers "though not perfectly correct is said to be legal is because his official acts are valid until he be ejected by the Kazis. The appointment does not affect the validity of the will so far as relates to the right of the legatee."[2]

[1] "Because he is an enemy;" *Radd.* "An infidel cannot be lawfully appointed executor to a Moslem even though he be his relation by blood, but an infidel may be the executor to one like himself;" Alamgiri, VI, p. 214.

[2] Sel. Rep. IV, pp. 49-55.

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Henry Imlach and another v. Mussumaut Zuhurunnissa Khanum.

The other case, *Henry Imlach and others* v. *Mussumaut Zuhurunnissa Khanum,*[1] reiterates the same principle. It follows therefore that the appointment as executor of a non-Moslem under the present conditions of society is valid.[2] Of course, if the executor endeavours to tamper with the religion of his wards or educate them improperly, the judge will be bound to remove him. Until such a removal, whether owing to such conduct, or because of the provision of the Mohammedan Law that it is expedient he should be removed, his appointment remains valid and his administration would be effectual.

If an executor labouring under the incapacity of difference of creed or minority or slavery attains, by conversion to Islam, or emancipation, or by coming of age, the capacity required by law he would continue to be executor unless he has been removed already. But there is this difference between the acts of a minor-executor and those of a non-Moslem and a slave-executor that whilst the latter are valid, the former are absolutely invalid.[3]

[1] Sel. Rep. IV, p. 301.

[2] The appointment of a non-Moslem executor is valid until set aside by the judge, and until then he is the lawful guardian of the children of the testator; but the Kazi or judge *cannot* appoint a non-Moslem as guardian to the children of a Moslem.

The text of the Alamgiri is to the following effect:

"When a Muslim has appointed an alien his executor the appointment is futile (*bâtil*) whether he be a *Mustâmin* or not, by which is to be understood that the appointment will be cancelled, for if it be of a *zimmi* the judge may cancel it and expel him from the office. When a *zimmi* has appointed an alien his executor the appointment is not lawful, for a *zimmi* is with respect to an alien in the same position as a Muslim with respect to a *zimmi*, and if the alien is one from whom danger may be apprehended to the property, the judge will expel him and appoint another in his stead. The appointment by a *zimmi* of a *zimmi* as his executor is lawful and in like manner that of a Muslim by an alien who has come into the Dâr-ul-Islam under protection is lawful, and in neither case is the executor to be removed. And if a Muslim should appoint an alien his executor and the alien be converted to the faith he remains in his state of executor. So also when the appointment is of an apostate who returns to the faith."

[3] Radd-ul-Muhtâr, V, p. 687.

When it appears to the Kazi that the executor appointed by the testator is really unable to perform the work, or is weak and inefficient, he should appoint another administrator to act with or assist the executor; or, if the inability appears to be permanent, he may appoint another person in the place of the *wasi*, which would be tantamount to removing him from the office.

If the executor should represent himself unable to perform the work imposed on him, the judge should not admit his representation without an inquiry to ascertain the fact; but should it appear that he is really incompetent, the judge should appoint another in his stead. Some jurists have held, that if the Kazi were to remove an executor appointed by the testator who was fit for his duties, such removal would take effect, though the Kazi may have, in doing so, acted unjustly and be guilty of committing a sin. In the Ashbâh, however, it is stated that there is a conflict of opinion on this point among the jurisconsults. Many of them, as is stated in the *Sharh-i-Wahbânieh*, regard such an order of the Kazi operative, but in the Fusûlain it is laid down that it is incumbent to hold such removal not to be valid, "though it is imperative [on the judge] to remove the misfeasor and untrustworthy." The commentator then adds, "in the 27th section of the Jâma-ul-Fusûlain it is stated, that when the executor appointed by the deceased is a just man, it is not proper that he should be removed by the Kazi; and if he does so, many jurisconsults have held that the removal will not take effect. In my opinion this is correct, for the testator is more bounteous to himself than the judge, and the *fatwa* should be in accordance with this view, for the Kazis of the day are the cause of disputes." "All this relates to an executor appointed by the testator, for the Kazi is entitled to remove an

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administrator appointed by him at any time, whenever he considers it expedient."[1]

Shiah Law.

The provisions of the Shiah Law regarding the qualifications requisite in an executor are analogous. It is requisite that an executor should be a person of understanding and a Moslem. Some jurists also require that he should be an *âdil* or just person, because a *fâsik* (dishonest person) is unworthy of trust. Whilst others consider this qualification as unnecessary, because all Moslems are trustworthy and because the executor is appointed by the testator. But the judge is bound to remove one who, though trustworthy at the time of his appointment, proved to be otherwise after the death of the testator; for his appointment must be considered as nullified, because the trust reposed in him by the testator was founded on a belief of his probity and would have been withdrawn on the confidence being found to be misplaced.[2]

It is not lawful to appoint another person's slave as an executor without the consent of the master. A person can lawfully appoint his own slave an executor if his children are minors, but not if they are adults.[3] Where an executor becomes permanently insane, the Kazi should appoint another in his place. If no such appointment is made and the executor recovers his reason, he remains as such.

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[1] "When an executor is an *amîn* able to dispose of property, the judge is not to remove him from office. So also when the heirs complain of an executor to the judge, he ought not to remove him without malversation, but when that is established he should remove him." Alamgiri.

[2] Sharâya p. 253; Comp. the rules in the Jâma-ush-Shattât.

[3] Radd-ul-Muhtâr, V, p. 687.

SECTION II.

APPOINTMENT OF EXECUTORS, HOW MADE.

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The executor is termed *wasi* and *musa-ilehi* and is defined to be an *amîn* or trustee appointed by the testator to superintend, protect and take care of his property and children after his death. He is also his *Kâim-mukâm* or personal representative.[1]

There are three kinds of executors :[2]—The first is a trustee who is capable of performing the duty which has been committed to him and such an executor is fixed (*mukurrur*) and *cannot be removed by the judge.*[3] The second is a trustee who is weak and incapable and to whom the judge should appoint an assistant. The third is a *fâsik*,[4] an infidel or a slave, whom it is proper that the judge should remove and appoint another in his stead. The word substitution implies that the appointment is valid in the first instance for otherwise there could be no removal.[5]

As stated before, the testator may appoint any person, (subject to the exceptions already mentioned,) as his *wasi*, and the appointment will take effect upon the acceptance of the person so appointed. Such acceptance may be either by word or deed, *i. e.*, may be either express or implied, and may take place either in the testator's lifetime

[1] "It is not advisable to accept the office of an executor, for it is a perilous matter on account of what Abû Yusuf is reported to have said—'To enter upon an executorship for the first time is a mistake, for the second a fraud, and for the third a theft;" Alamgiri, VI, p. 211; Radd, V, p. 685.

[2] There is considerable difference in the position of the *wasi* under the Mahommedan Law and that of an executor under the English law. The *wasi* is the *locum tenens* of the testator for the management and preservation of the deceased's property, but the legal estate does not vest in him. Comp. the provisions of the Probate Act, (Act V of 1881).

[3] See *ante*, p. 547.

[4] Untrustworthy person.

[5] Radd-ul-Muhtâr, V, p. 687.

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or after his death. Any dealing with the testator's property after his death amounts to acceptance.

The person appointed is entitled to renounce the executorship or to refuse to accept it, and if he does so, the appointment does not take effect. When the appointment and the refusal take place in the presence of the parties, there is no difficulty. But when an executor is appointed in his absence, and on being informed of the appointment after the testator's death, says, 'I do not accept,' but subsequently says, 'I accept,' the acceptance is lawful, "unless the judge had removed him from office before he expressed his acceptance." But if he had expressed his refusal during the testator's lifetime, and should, after his death, desire to accept the office, the acceptance would not be valid. Though, if he were merely silent in the presence of the testator instead of saying, 'I do not accept,' and should subsequently, either in the lifetime or after the death of the testator, express acceptance it would be lawful, whether made in the presence of the judge or not, unless the judge had, previously to his saying so removed him from office, when his subsequent acceptance would not be valid. If he should say in the absence of the testator, 'I do not accept,' and should communicate his refusal to him either by letter or messenger, and after this should say 'I accept,' the acceptance would not be valid.

After the appointment has once been accepted or properly dealt with, the executorship cannot be renounced.[1] But the executor can obtain his discharge from the judge. Mohammed has laid down in the *Jáma-us-Saghîr* that when a person has been appointed an executor and has accepted the office in the testator's lifetime, the exe-

[1] Radd-ul-Muhtâr, V. p. 686. It would seem, however, from what is stated in the Ashbâh that he may do so, if there is a provision to that effect in the will.

cutorship is binding on the acceptor, so that if he should wish to withdraw from the office after the death of the testator, he is not at liberty to do so. But if he renounces in the lifetime of the testator and "before his face," the renunciation is valid, but if it is not made "before his face," it is not valid. What is meant by saying, "before his face" is with *his* knowledge, and "not before his face" is without his knowledge. This is according to the *Muhît*. If an executor should accept in the presence of his testator, and the testator should say when he is absent, 'take witness that I have discharged him from the executorship,' the discharge is valid.[1] But if an executor should reject his appointment in the testator's absence (after he has once accepted,) the rejection according to the Hanafis is void.[2]

Shiah law.

The provisions of the Shiah Law are analogous. It is declared that an executor may lawfully reject his office while the testator is alive, provided that he is duly informed of the rejection; but if the testator should die before the rejection or after it, without the information having reached him, no effect can be given to the rejection and it is incumbent on the executor to take upon him the duties of the office.

If an executor is incapable of discharging the duties of his office the judge may appoint an assistant to him, but if he is guilty of fraud he must be displaced and another appointed in his stead.[3]

An appointment of an executor may be made in any terms which indicate the intention on the part of the testator to make him his *locum tenens* or *Káim-mukám*

[1] Alamgiri, VI, pp. 211-212; Radd-ul-Muhtâr, V, p. 686.

[2] "It would be a fraud on the testator to keep silent in his lifetime and then refuse;" Radd.

[3] Sharâya, p. 252.

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after his death. If a person were to say to another, "thou art my *wakil* after my death," that would amount to the appointment of an executor.

In the Kazi Khan, Khulâsa and other works, it is stated that if a person were to say to another, "I consign to you my children after my death," or "take care of my children after my death," or use any similar expression by which authority is given to another to do certain acts on behalf of the testator after his death, it would create an executorship. In the Waluljih, it is stated that if a person were to say to some people, "do this for me after my death," that would constitute all of them as his executors. And if they all remain silent until after the death of the testator, when some of them only accept, these alone would be *wasis*. But if only one accepted, he will not be entitled to act as executor, until the Kazi has associated another person with him in the administration of the testator's estate, for it was clearly the intention of the testator to confide the executorship to more than one person.[1]

An executor can be removed without his assent, and without his knowledge. This is different from the removal of an agent, who must be informed by his principal that he has been removed.

When a man has appointed two executors, one of them according to Abû Hanifa and Mohammed cannot alone dispose of the property; and acts done by either of them singly are not operative without the sanction of the

[1] "A man addressing a number of persons says to them 'Do so after my death.' If they accept they all become executors and if they remain silent till the testator's death and two or more then accept, these become executors and may lawfully carry the will into execution. But if only one of them accepts though he is the executor he cannot lawfully carry the will into execution without bringing the matter before the judge who may either appoint another to act with him or authorize him to act by himself." Alamgiri, VI, pp. 218-219.

other, except in some special matters. Thus one may act separately as to the washing and shrouding of the deceased's body and its removal to the grave, the payment of debts out of assets of the same kind as the debts, the delivery of specific bequests, the restoration of deposits, or of things usurped by the deceased or acquired under defective sales, the manumission of a specific slave and and the general preservation of his property. But they cannot act singly in taking possession of deposits belonging to him, nor in receiving payment of debts due to him, though they may in suing for his rights. According to the same authorities, they may also act separately in accepting a gift for a minor, sanctioning his acts, making partition of things weighable or measurable, and selling what is liable to spoil. When the deceased has directed certain specified portions of his property to be bestowed in charity on beggars and indigent persons without particularizing them, one executor cannot act separately from the other according to Abû Hanifa and Mohammed, though he may do so according to Abû Yusuf, but if the objects of the charity are specified he may act alone according to them all. In what has been said it is supposed that the two executors have been appointed together at one and the same time, *lit.* in one sentence (*kalâm*). When one was appointed before the other, some of the Hanafi jurists hold that each of the executors may act separately, while others have declared that according to Abû Hanifa and Mohammed they cannot act separately in any case in disposing of property, and this has been adopted by Sarakhsi. If, however, two executors are appointed with the express provision that either of them may act singly, or if the testator has declared that each of them is a complete executor (*wasi tamm'*) each one of them may dispose of the property alone.[1]

[1] The above is from the Alamgiri. The passages in the Radd also deserve attention.

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When there are two executors, the acts of any of them are *bâtil* (void) [unless ratified by the other,] like the acts of one of two mutwallis. The result is, that if one of them gives a lease of *wakf* lands, it would not be valid until consented to by the other, even though the executors may have been appointed separately. Some jurists, among them Abûl Lais, have held that when the appointments are made separately, they can act separately; in the Mabsût, however, the first opinion is maintained as correct, and it is adopted by the Durrur. This is the case when the two executors are appointed by the deceased or by one and the same judge; but if they have been appointed by two separate Kazis, they can act separately, for as the Kazis can act validly in their separate jurisdictions, the administrators as their *naibs* or delegates can also validly do so.

The ratification of the co-executor does not amount to a renewal of the contract, it only imparts the necessary validity which was originally wanting. If one *wasi* acts without the knowledge or the consent of the other, and any property is lost, the trustee or executor so acting will be liable to recoup the loss. One executor can appoint his co-executor his *wakil* or delegate, in which case the acts of the co-executor by himself will be valid.

Abû Yusuf holds that each mutwalli can act singly. But Abû Hanifa and Mohammed hold otherwise (whether the appointments are separately made or in one single act). And the opinion of Imam Abû Hanifa is generally acted upon.

The acts of one executor singly, like the acts of any one mutwalli, will not be *bâtil* respecting the purchase of shrouds for the testator, his funeral,[1] in the litigation

[1] "This exception is founded on the reason of necessity, for delay in these matters would lead to the corpse decomposing. And for this

of his rights,[1] in the purchase of necessaries for his children,[2] in the acceptance of gifts made to the testator, in the emancipation of specified slaves, in returning deposits (with the testator) and payment of specified legacies. In the *Sharh-wahbánieh*, the following matters are included as being within the scope of an executor acting singly, *viz.*, he may lawfully return things acquired by the deceased by embezzlement, or under an invalid sale; partition things which can be measured or weighed, (perishable commodities;) he may demand from the debtors of the deceased specified debts due to the testator, and pay the same.

When there are two executors, and one of them is absent, the other executor can validly act by himself, if the absentee is at such a distance that no *káfila* or caravan can reach him.[3]

reason, neighbours are authorized to take charge of the funeral of a deceased; and fellow-travellers of a person dying on the road," Radd.

[1] "Because several do not join in litigation and when they join, only one pleads," Durrur of Mulla Khusru.

[2] This is also founded on the reason of necessity, for otherwise the infants would suffer."

[3] Such an absence is technically called *ghîbat-i-munkata*. The rule is founded on the necessity of two executors acting in consultation. When one is so far away or residing in such a place that no letter or news can either reach him or be received from him, the law regards him as non-existing for the time, and does away with the necessity of two executors acting together.

"Things deposited with the deceased can be returned by one executor, but the deposits of the deceased can be received by the two; this is the view of Saijani given in the Hindyeh (Alamgiri)."

"This is the view of Ibn Shahna; but where something is to be sold in order to pay the legacy, it cannot be done without the consent of the co-executor."

"Kazi Khan adds that one executor can lawfully take possession of any inheritance which might have devolved on the testator before his death, provided there is no debt attached to it; and of properties and deposits in the residence of the testator, to preserve them from loss or damage. He can also redeem pledges."

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A single executor may validly sell anything which it is feared may be lost. It has been already observed, that according to Abû Yusuf each executor can act validly in all matters, but Imam Abû Hanifa and Mohammed differ. Where, however, the testator has declared by his will that the executors may act jointly or severally, each can act singly according to all jurists.

Shiah Law.

The Shiah Law is slightly different, it says that when two persons have been appointed in general terms or with an express condition that they are to act jointly, one of them cannot act singly without the other and if either of them should do so, his acts would not be lawful, except such as are positively incumbent or necessary, as for instance, the providing of clothes and food for the infant children of the testator. And it is held to be incumbent on the judge to compel them to act jointly, and when that is impracticable he may appoint others in the stead of both. So when there are two executors, they can not apportion the property between themselves for the purpose of separate management. If one of them should fall ill or become incapable of performing the duties of the office, the judge must appoint an associate to the other who is competent, but this power cannot be exercised when one of them dies or becomes *disqualified*, for the remaining executor is empowered to act singly and the judge has no authority while there is an executor of the deceased surviving and competent to act. If the testator has made it a condition that the executors are to act jointly and sepa-

For example to make a partition of such things with the partner of the testator.

Though one executor may not grant a receipt or discharge for a debt due to the deceased, yet he may validly make a demand for it and prefer a suit for the same.

In the Hedâya these principles are set forth with considerable distinctness and may be studied with advantage.

rately, in that case the acts of each singly are lawful. They may, also, lawfully divide the property between them and each take upon him the management of a part, in the same way as they might have acted separately before the partition.[1]

Hanafi law; executors for a special purpose.

When two executors are appointed for two different purposes, *e. g.*, one for the payment of the testator's debts and the other for the administration of his estate, according to Abû Hanifa and Abu Yusuf, both are general executors, competent to act in all matters; though Mohammed differs and holds that the authority of each is restricted to the purpose for which he is appointed. But where it is made an express condition that one executor shall not act in the matter to which the other is appointed, Mohammed-ibn-al Fazl states that, according to all opinions, the powers of each executor will be restricted within the limits laid down by the testator, and it is only where he has not made such a condition that there exists the difference of opinion above mentioned, the *fatwa* being with Abû Hanifa.[2]

When one of two executors dies appointing his co-executor as his own executor, in that case the surviving executor can act singly in respect of the original testator. If the deceased executor appoints another person as his executor, such person will become associated with the surviving executor of the original testator, who will not be entitled to act alone. Where the deceased executor has appointed no executor for himself, the Kazi should associate another person with the surviving executor, for it was the intention of the testator that the execution of his will should be entrusted to two persons. This is stated in the Durrur.

[1] Sharâya; the Mohakkik, however, thinks this view is open to doubt.

[2] Alamgiri, VI, p. 215.

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If one of two executors becomes insane or otherwise incapable, the Kazi shall appoint a substitute for him, but he cannot assign the executorship to the co-executor. But if one of them turns out to be dishonest, the Kazi may either associate another person or authorise that other to act by himself.

The executor of an executor, however removed, can act as the executor of the first testator. Shâfeï differs on this point.

With reference to the powers of a derivative executor, the doctrine is put by the Radd in four aspects. (*a*) Either the deceased executor, whilst appointing an executor, leaves his powers regarding the estate of the original testator undefined, *e. g.*, he may only say, "I make this person the *wasi* after me;" (*b*) defines his powers, *e. g.*, says "I make this person a *wasi* of my estate;" (*c*) or, declares expressly "I make this person a *wasi* of the estate of my *musi* (testator;)" (*d*) or says "of both estates."

When the powers are left undefined or it is expressly declared that he is to be the executor of both estates, the executor of the deceased executor will, according to the majority of jurisconsults, become the executor of the original testator. On this point Shâfeï and Zuffer differ.

Where it is simply declared that he is to be the executor of the estate of the deceased executor, there are two reports from Abû Hanifa, the most approved being that he would be the executor of both estates. And there are two reports also from the Disciples, the most approved being that his powers will be restricted to the estate of his own testator. And if the deceased executor said, "I constitute this person executor of the original testator," it would be so. This is according to all the jurists. And so it is stated in the Tatâr-khânieh, Sharh-i-Tahâwi and other works of authority.

In the Alamgiri the above principles are stated thus :— "When a man has appointed two executors and one of them dies, the survivor cannot, according to Abû Hanifa and Mohammed, dispose of the property, but should lay the matter before the judge, who if he sees proper may make him sole executor and transfer to him the power of disposal, or add to him another in the place of the deceased. According to Abû Yusuf, however, the survivor can act alone, as in his opinion he was competent to do while the other was alive. Though one of the executors should accept after the death of the testator and the other should not accept, or though one of them should die before the testator and before acceptance by the other, the single executor is incompetent to act by himself according to Abû Hanifa and Mohammed, while according to Abû Yusuf he is competent. If one of two executors is *fâsik*, the judge may authorize the other to act singly or may join another with him instead of the *fâsik*, in which case the just one could not act without the other according to Abû Hanifa and Mohammed, while according to Abû Yusuf he could. A person having appointed two executors, one of them dies, having first appointed his co-executor to be his executor. This is lawful and the co-executor may dispose of the property of the first deceased, for as he could have done so with the sanction of his co-executor in his lifetime, so he can in like manner do so after his death. There is another report, however, against the legality of the disposal but the first is correct."

If a person should appoint an executor and direct him to act in conformity with the instructions of a third person, *e. g.*, "with the knowledge of so and so," the executor may act without that third person's knowledge. But if the direction was, "do not act without his instruc-

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tions or knowledge," it would not be lawful for the executor to act without his knowledge, and the *fatwa* is to that effect. If the testator should say, "Act in accordance with the opinion of so and so," or "Do not act except with the opinion of so and so," in the first case the person addressed would be the executor, in the second they are both executors according to the approved doctrine. Abû Nasr has said that if the words were, "Act in the matter with the orders of so and so," he is executor specially; while if the words were, "Do not act without his orders,' both would be executors and this seems probable according to the doctrine of "our" masters. When a man appoints one person his executor and another *mushrif* or inspector over him, the first is the executor not the *mushrif*, the effect of whose appointment is that the executor cannot act without his knowledge.

Shiah Law.

According to the Shiah doctrines, an executor cannot entrust the management of his testator's property to his own executor, *without the power having been reserved to him.* When an executor has his testator's authority for bequeathing the management of the estate at his own death, he may lawfully do so by general agreement. According to the approved doctrines he can also do so when the testator has neither authorised nor forbidden such appointment, though some jurists hold a different view. When there is no provision in the original testator's will, the superintendence of his estate, upon the death of the executor, devolves upon the judge. In like manner, if a person should die without appointing an executor, the superintendence and care of his estate belongs to the judge. And if there is no judge present on the spot, any true believer in whom confidence can be placed may lawfully assume the care and management of the estate, though there is doubt and difference of opinion on this point.

When there is an executor appointed by the testator, the Kazi cannot appoint an administrator unless the executor is absent, such absence amounting to a *ghîbat-i-munkata ;* this is stated in the commentaries of Abû Saood.

If a person were to prefer a claim against the estate of the deceased and the executor is absent, the Kazi will appoint a person as defendant to represent the testator. If the executor is present and consents to the debt, the Kazi may at his discretion appoint, another person to represent the testator, so that the plaintiff may properly prove his claim against him. For the acknowledgment of the *wasi* is not valid against the testator, and the plaintiff cannot recover a decree against the estate of the deceased by the mere consent of the executor.

Where the property of an infant child is managed by the father who wastes it, the Kazi can take it away from his hands and place it in the hands of a curator to act as a *wasi*.

NOTE.

"If a man appoint two executors, neither of them is entitled, according to Abû Hanifa and Mohammed, to act without the other, except in particular cases, of which an explanation shall be hereafter given. Abû Yusuf is of opinion that in all cases either of them may act without the other, because, an executor is endowed with his power of action in virtue of the will of the testator ; and as power of action is a thing sanctioned by the law, and incapable of division, he enjoys his power complete and perfect in the same manner as a complete authority to contract their infant sister in marriage appertains to each of her brothers respectively. (The ground of this is that executorship is a succession, which succession cannot be established in the executor, unless the authority of the testator devolves to him in the same degree in which it had appertained to the testator, that is, completely and perfectly.) The testator's choice, moreover, of the two to be his executors is an argument of the particular attachment of each to his interest, which attachment is equivalent to the consanguinity of two brothers in the point of contracting their infant sister in marriage. The

arguments of Abû Hanifa in support of his opinion are twofold. First, the power of an executar being derived from the testator is of consequence to be exercised in the manner prescribed by him ; and in the case in question the testator has entrusted this power to both the executors on the condition of their being united in the trust, for he does not expressly assent to their acting otherwise than jointly, and the above condition is moreover attended with advantage, as the deliberations of two persons are better than of one. It is otherwise with two brothers, in the circumstance of contracting their infant sister in marriage (as adduced by Abû Yusuf,) since the cause of such authority being vested in them is relationship, a cause which exists equally in each. The contracting in marriage, moreover, is a right of the infant, resting upon her guardian, (insomuch that if the infant require her guardian to contract her to any person being her equal for whom she has a liking, he must comply,) whereas, in the case here considered, the acting (with the estate) is the right of the executor himself, not of another resting upon him. In the case of contracting the infant in marriage, therefore, if one of the two brothers so contract her, he merely discharges a duty incumbent on the other brother and his act is therefore valid, whereas in the case of executorship if one of the two act alone, he exercises a right appertaining to the other and his so doing is therefore invalid—in the same manner as where two persons owe a sum of money to one, in which case it would be perfectly lawful for either of them to discharge the whole debt, whereas supposing one man to owe a sum of money to two others, it would not be lawful for him to pay the whole to either of them."

"The cases excepted by Abû Hanifa and Mohammed in which they hold the acts of either executor, singly, to be valid, are such as require immediate execution. Thus, it is lawful for either executor singly to disburse the funeral charges, as a delay in this might occasion the body to become offensive, whence it is that a similar power is vested in the neighbours. In the same manner either of the executors singly may purchase victuals or clothes for the infant children of the testator, this being a matter of urgency and which admits of no delay."

"So, likewise, it is lawful for either of the executors to restore an usurped article, or deposit a thing purchased by the testator under an invalid contract. In preserving the estate of the testator also, and in discharging his debts, the act of either executor is lawful independent of the other. For none of these are considered as an exercise of power but merely the performance of a duty, insomuch that the depositor has himself a right to seize and carry away his deposit, if he find it among the effects of the deceased, and the creditor has a similar right with regard to his debt, and it is moreover the duty of every one into whose hands property may fall to attend to the preservation of it, whence this comes under the description of aid and assistance not of an exercise of power—neither do any of these acts require thought or consideration. Either of the executors has also a right singly to discharge a legacy or emancipate a

slave, if directed by the testator because such deeds require no thought or consideration."

"In the same manner, either of them may institute a suit in claim of the rights of the testator, because a conjunction of both in so doing would be impracticable, since, if they were to do it at one and the same time in the assembly of the Kazi, they must occasion noise and confusion (whence it is that only one of two agents for litigation is allowed to plead at a time). The acceptance of a gift for an infant is likewise an act which either may perform singly, for in case of delay there is a possibility of the gift being rendered null by the death of the donor previous to the seizure. These acts, moreover, being permitted to a mother and nurse is a proof that they are not exertions of power. It is likewise permitted to any of the executors singly to sell goods where there is an apprehension of their spoiling as in the case of fruit and the like, and also to collect together and preserve the scattered property of the testator as a delay might occasion the destruction of it, and such permission is, moreover, given to every person into whose hands property may fall whence it may be inferred that this is not an exertion of power. (It is recorded in the Jama Saghir that none of the executors, where there are more than one, has singly the power of selling goods or receiving payment of debts because these are exercises of power which they must perform jointly in conformity with the will and intention of the testator.)"

"If a person appoint two executors in a separate manner (as if he should first say to the one, 'I have appointed you my executor,' and again at a different period to the other, 'I have appointed you my executor,') some allege that in this case each of them has individually a power of exercising the functions of the appointment without consulting the other, in the same manner as two agents where they are appointed by different commissions—the reason of which is, that the testator, in appointing the two separately, indicates his assent to each acting from his own judgment without the other's assistance or advice. Others again say, that concerning this case a disagreement subsists between Abû Hanifa and Mohammed on one side and Abû Yusuf on the other, because a will is not established until the death of the testator, and at that time both are executors together, notwithstanding they had been appointed separately. It is otherwise with two agents appointed under different commissions, for the appointment of each of those still continues distinct and separate as settled by the constituent."

"If one of two executors die, it is incumbent on the Kazi to appoint another in his room. This is the opinion of Abû Hanifa and Mohammed, because according to their doctrine the remaining executor has not of himself power to act on every occasion and the interest of the deceased therefore requires the appointment of another to operate with him, and it is also the opinion of Abû Yusuf, because, although the remaining executor be (according to him) empowered to act of himself, still it behoves the Kazi to

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appoint another his companion, for the design of the testator evidently was to leave two successors, the management of his concerns, and as this may be fulfilled by the appointment of a substitute for him who dies, one must be appointed accordingly;" Hedâya, IV, Bk. LII, Ch. VII, pp. 543-546.

SECTION III.
THE POWERS OF THE EXECUTORS.

The powers of an executor in the Mahommedan system are governed by rules closely analogous to those under the English law. But there are points of difference which require careful attention.

When the heirs of the testator are minors, the powers of the executor are, within certain limits, absolute. In case of necessity, he has the power of selling the property and investing the proceeds, after discharging any debts of the testator or those incurred in the maintenance of his infant children, in other and more profitable kinds of property. The sale, however, must be for an adequate consideration, "such as is reasonable among people of business."[1] The executor cannot sell the property to himself or to any relative of his, whose evidence, under the Mohammedan law, would be inadmissible against him.[2] He can enter into a partition with the co-sharers of the deceased or the legatee, in respect of the minor's shares in all kinds of property, both moveable and immoveable, "even with a slight inadequacy in the terms (*ghubn-i-yasîr*)." A partition, however, where the inadequacy is manifest or glaring, *i. e.*, great, is ineffective.

When *all* the heirs are minors, the allotment by the executor of the legatee's share, and the retention by him of the residue for the heirs, is valid and effective. And in case any portion of their share is lost in the hands of

[1] Radd. [2] *Ibid;* Alamgiri, VI, p. 220.

the executor, the minors have no right to be recouped either by the legatee, or by the executor, unless it is occasioned by his wilful neglect or default. But when some of the heirs are adult and *absent*, the executor can lawfully enter into a partition on their behalf with the legatee in every thing except *akâr* or *what is immoveable*, and to hold the shares of the minors for them. If all the heirs are adult or some of them are *adult* and *present*, any partition made by him is void against those heirs who are adult, both with respect to moveable and immoveable property. But if the heirs, though *sui juris*, are *absent*, the partition effected by the executor is inoperative so far as the immoveable property is concerned, in other words if the heirs are adult but not present, a partition of moveable property alone made by the executor with the legatee is valid.

When the testator has left specific bequests to individuals, a division of the property by the executor among the heirs, in the absence of the legatees, is not effective; and in case the share or shares allotted to the legatees should perish, they would be entitled to claim a share to the extent of a third of the estate from the shares given to the heirs.[1]

But when the partition is effected by the judge, and the portion allotted by him to the legatee is held in his custody, the division is valid, and if the legatee's portion should perish in the hands of the judge or the curator appointed by him, the legatee would have no right of recourse against the heirs, neither would the judge be responsible.[2] "This rule applies, however, only to those things which can be *weighed or measured*—a partition of which is, in

[1] "The legatees can claim also against the executor, according to Zailye. All this when a partition is made without leave of the Kazi," Radd.

[2] Radd-ul-Muhtâr, V, p. 692; Alamgiri, VI, p. 220.

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fact, a division. But with respect to things that are not so, a partition would in effect amount to a mutual exchange, like a sale, and, consequently, would be unlawful, for it is not lawful to sell another person's property."[1] "And when the judge has appointed a guardian (*wasi*) for an orphan *in all things*,[2] and he has made a partition on his behalf, whether of moveable or immoveable things, the partition is lawful, but if the appointment is only for a special purpose, as for the maintenance of the orphan or the conservation of his property, the partition is not lawful."

The powers of a *wasi* appointed by the mother.

The powers of a *wasi* appointed by a mother or any other relation, such as the brother or uncle, are very limited. He has no authority to deal with the immoveable property of his wards under any circumstance, nor with any property inherited by the minors from any person other than their mother. The *wasi* can deal with their moveable property, inherited from the mother, or on their behalf enter into a partition in respect thereof, provided the father be not alive, and there be no executor appointed by him.

When an executor makes a partition *among* the heirs, who are all minors,[3] the partition is unlawful. If they are all adults, but some of them are absent,[4] and a partition is made with those who are present and their shares separated from the mass, the partition is lawful with respect to *chattels* (*matá*) but not as regards immoveable property.[5] If there are both minor and adult heirs, but the adult are

[1] Alamgiri, VI, p. 220.

[2] *i. e.*, with general powers.

[3] "An executor cannot make a partition of the shares of the minors among themselves;" Radd.

[4] "If the heirs are absent at three days' journey or more; this is according to Kahastâni." The distance must in every case be such that it is difficult to communicate without delay.

[5] Kazi Khan; Alamgiri, VI, p. 222.

absent, the partition is unlawful. If the adults are present and their share is given up to them and the shares of the minors separated from the shares of the adult heirs, and kept *in a mass without partition among the individual minors*, the division is lawful. When the share of each minor or adult is separated from the rest, the whole partition is invalid. But if the portion of the adults is surrendered to them, and the portion of the minors retained, and subsequently on their attaining majority, divided among them, the partition, as between the adults and the minors, is valid.

Power of sale possessed by the *wasi*.

When the testator has left a direction in the will empowering the executor to sell his property and invest the proceeds in any other kind of property, the executor can lawfully do so.

When the executor contracts a debt on behalf of the minor without any necessity therefor, it will not be operative against the minor and if any loss accrues to the orphan therefrom the executor will be liable.

"When an executor appointed by the father sells anything belonging to the estate of the testator, the legality of his act will have to be considered in two aspects :—

"The *first* is, when the deceased has left neither debts nor legacies ; the *second* is, when he has died either leaving debts or legacies. In 'the Book,'[1] it is laid down that even when there are no debts or legacies to be paid out of the estate of the testator, the executor may sell the whole property, moveable and immoveable, *when the heirs are minors*. But Shams-ul-aïmmah Halwâï has said, what is stated in 'the Book' was the opinion of the ancients, and that, according to the moderns, the *akâr* or immoveable property of a minor can be sold only, when there are no debts nor general legacies, *if the minor has occasion for*

[1] Mukhtasar-ul-Kudûri is meant here.

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the price thereof, or a purchaser is eager to obtain it by giving double its value, or the sale is otherwise to the minor's advantage, as for instance, when the *khiraj* or land-tax is to be paid, or when the expenses exceed its income, or the property being a shop or a mansion is falling into decay. With regard to the land-tax, when a necessity arises for paying it, and there is belonging to the estate any other property besides *akâr*, that property is first to be applied towards its payment, and if that is not sufficient the *akâr may then be sold* for its proper value, or a price not much less than its value, but the executor cannot lawfully sell it at a greater depreciation than men would usually submit to. And, in like manner, an executor cannot lawfully purchase for a minor anything at a price much above its value."[1]

In the Radd, the principle is stated somewhat more explicitly :—" The ancients held that an executor could sell the immoveable property of the minors according to his discretion, but modern jurists have imposed several restrictions on the power of sale possessed by the executor, in the case of immoveable property belonging to his minor wards. These restrictions are specified in Kazi Khan, and Zailye declares that Sadr-ush-Shahîd holds the *fatwa* is according to the modern view. These restrictions are as follows :—(1) if the testator has died leaving debts and it is necessary to sell a portion of the property to discharge such debts, *i. e.*, the debts cannot be paid off without selling some portion of the immoveable property, he may lawfully do so for adequate value ; (2) if the testator has directed the payment of legacies in money and he has left no cash out of which such legacies can be paid, the executor can sell a portion of the immoveable property sufficient to pay off such legacy ; (3) if there is a reasonable apprehension of the property

being lost by decay or dilapidation, like a house falling into ruin, etc.; (4) when the property is in the possession of an usurper, and there is no prospect of its being recovered; (5) when the expenses connected with the management or preservation of the property exceed the income; (6) when it is necessary to pay the royal taxes and there are no funds wherewith to pay them; (7) when the price offered for the property is double its real value.

The executor can lawfully sell to any person other than himself any moveable property belonging to his minor wards, or purchase for them any property from such persons, but it must be for the consideration usually current in transactions of that kind. If the sale or purchase is for an inadequate consideration, it is not valid and can be set aside, and the executor would be liable.

An administrator or guardian (*wasi*) appointed by the Kazi cannot purchase anything belonging to his minor wards, nor can he sell to them anything belonging to himself; but where a *wasi* appointed by the father of the minors enters into such a transaction, it is valid, according to Abû Hanifa, if it is to the *manifest* advantage of the minor. The Disciples hold the transaction to be absolutely invalid. The *fatwa*, however, is according to Abû Hanifa.[1]

According to some jurists, the father may sell his infant children's property, provided he is an *amîn* or a person worthy of trust, and the sale is to their *manifest* advantage. But where the father is an untrustworthy person, the minor, on attaining majority, can set aside the sale, unless it was for double the real value of the property,

[1] "When an executor sells the orphan's property to himself, or his own to the orphan, the sale is lawful according to Abû Hanifa, and according to Abû Yusuf also by one report, when the sale is obviously for the benefit of the orphan though unlawful when not obviously for his benefit. According to Mohammed and Abû Yusuf by another and more probable report such a sale is unlawful under any circumstances," Alamgiri, VI, p. 224.

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and the *fatwa* is according to this doctrine. And Hamawi has stated in his commentaries on the Ashbâh, that a father has no greater power than an executor, and his powers are subjected to the same restrictions; Hanouti has also passed *fatwas* according to this view. All this applies to the sale of immoveable property. With respect to moveable property, the father, [if *de facto* guardian,] can sell an infant's goods for the current price, if it is to the advantage of the minor and even with a slight inadequacy, but such inadequacy must not in any case be great, otherwise the sale would be invalid.[1]

The executor cannot trade with the goods of the infant on his own account, but, according to the Durrur, he can do so for the orphan, if it is to the latter's advantage. If the executor should engage in trade with the property of his minor ward, the profits derived therefrom should, according to some jurists, be given in *sadkah* or alms, and the money so employed recouped to the estate of the minor. According to Abû Yusuf, the profits made in such trade would belong to the minor, and Kazi Khan declares the *fatwa* is according to this view. But the Kazi can authorise the executor to trade for the infant with his goods or enter into partnership with another.

[1] "An executor may give out the property of a minor in *muzâribat*, but he cannot lawfully give a long lease of part of the deceased's estate for the payment of debts nor lend the property of a minor according to all reports, and if he should do so he would be responsible. Neither is it competent to the judge to lend the minor's property nor for a father to do so according to the correct doctrine. If an executor or a father should pledge the property of an orphan for his own debt, the pledge ought not by analogy to be lawful, but it is so on a liberal construction of law. But it is not lawful for the executor to pay his own debt with property of the orphan. If, however, a father should do so it would be lawful. And an executor may sell the orphan's property in exchange for his own debt to his creditor according to Abû Hanifa and Mohammed and the price becomes a set-off against his debt, but he is responsible to the minor;" Alamgiri, p. 228. See Appendix IX.

The executor can, if it is to the advantage of the infant and there is a need for it, let out the infant's property on hire, but he cannot create a mortgage without the leave of the Kazi. He is authorised, however, to pledge or sell the chattels, if it is necessary for the maintenance of the infant children of the testator.

If the executor sells the goods on credit, the period for which credit is given must be the customary period. But where it is to the disadvantage of the infant or the period for which credit is given is either too long or not customary, according to Ramli the transaction will not be valid.

Where there are two infants under the guardianship of two separate executors, the sale of the goods of one infant by his guardian to the other is stated by Kazi Khan not to be lawful. And this view is accepted in the Alamgiri. The correctness of this principle has been questioned in the Radd, where it is laid down that there is no reason to render such a sale invalid, "for," the commentator adds, "the dealing by the executor is not for himself, and the sale of a particular property on behalf of one infant may be as much advantageous to him as its purchase by the other."[1]

The executor is liable for any serious inadequacy in the consideration of any property sold or purchased on behalf of the infant.

The executor must not spend at the funeral of the testator more than is customary.

When an infant has not attained discretion, and the executor has made over the property to him and it is lost,

[1] "And when an executor of two orphans sells the property of one of them to the other, the sale is unlawful. So also when he authorizes them to enter into such a transaction with each other and one accordingly sells his property to the other, the sale is unlawful," Alamgiri, VI, p. 228.

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the executor is liable. Discretion (*rushd*) means the capacity to take care of one's property. Abû Hanifa holds that an executor should not make over the property until the ward has attained his 25th year. But the Disciples are of opinion that discretion should be presumed when the infant attains majority, but the presumption may be rebutted by proof of the fact that he is weak in intellect, or unqualified to take proper care of his property.

When the testator devises one-third of his estate to be disposed of according to the *joint* discretion of his executors,[1]—and if one of them dies, "the third will be returned to the heirs."

When the heirs are all *sui juris* and present, the executor cannot sell any portion of the estate except under their authority. But if they are absent, he can only sell the chattels belonging to the estate, but not the *akâr* or immoveable property. But he is authorised, in case there be need for it, to lease the immoveable estate. The reason of this restriction is founded on the principle that an executor has the power of conservation over the property of an absent person, and as it may be necessary to dispose of the moveables which may be likely to be wasted, the executor has the power to do so and realise for the absentee the price of such goods. But *akâr* or immoveable property is secure in itself and the executor has no authority to part with it, *except in the case of its falling into decay*, and in that case it may also be sold. When all the heirs are adult and one of them is *absent*, while the others are present, the executor may, by general consensus, sell the share of the absentee in all that is not *akâr* for the sake of preserving it. According to Abû Hanifa, the *wasi* may also sell the shares of those who are present; but according to the Disciples, the sale

[1] *Lit.* To do whatever they together like with it.

of their shares is unlawful and this is the accepted doctrine.

All this refers to cases where the testator has left no debts nor legacies. But if there are debts and they cover the whole of the estate, the executor may sell the whole by general agreement; and when the debts do not cover the whole estate he may sell as much of it as may be necessary for the payment of such debts. When, however, an executor has actually sold *akár* or immoveable property in good faith for the payment of debts while he has other property in his hands sufficient for that purpose, the sale is lawful. Similarly, if there are general legacies, the executor may sell as much of the property as may be necessary for their liquidation (not exceeding of course a third of the whole after payment of the debts).

If a person dies leaving several heirs, one of whom is a minor and the rest are adult, and his estate is not burdened either with debts or legacies, and consists entirely of chattels, the executor may sell the share of the minor and invest the proceeds in some more profitable property.[1]

The *wasi* cannot borrow from the funds in his own hands belonging to the infant.

The executor can take his fixed allowance from the estate and nothing more, but the father, if in want, can support himself "to the extent of necessity" from the property of his infant child. This, however, does not apply to the executor.

A gratuitous executor cannot be compelled to administer to the estate of the testator, and the Kazi, therefore,

[1] This is *bil-ijmaá* or by general agreement; Abû Hanifa is of opinion that he may sell the shares of the others also, but in this view, Abû Yusuf and Mohammed differ.

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has the power to fix an allowance for him. The *fatwa* is according to this.[1]

In the Kazi Khan, however, it is stated that where no allowance is fixed for the executor, he can take a limited and reasonable sum for his remuneration "to the extent of his necessity;" and, if there is any need for it, he can make use of the infant's conveyances in going to and fro on the work of the infant, though several jurists hold that this would not be valid.

Among the Hanafis, the executor of the father is entitled to the curatorship of the testator's infant children in preference to the grandfather.

The *wasi* cannot make a binding acknowledgment of a debt against the estate of the testator, and the acknowledgee (مقرله) would not be entitled to receive his demand until he establishes his claim by proof.[2]

Nor can the *wasi* acknowledge that somebody else is entitled to a share in the inheritance, unless he himself is an heir, when the acknowledgment will have operation against his own share.

When a person has died intestate without appointing an executor and no reference is made to the Kazi,[3] one of the neighbours (*ahl-i-mahulla*) may legally administer "according to necessity." And the *fatwa* is on this.

When the estate of a deceased person is subject to debts, but the debts do not overwhelm the estate, in other words, do not exceed the assets—and it is divided among the heirs; and subsequent to the partition, a creditor of

[1] "And a *fatwa* to this effect is in the Hamâdia and I have given several similar *fatwas*."

[2] "And if the *wasi* pays to the claimant what he demands, the *wasi* will be liable. If the claimant has no proof, but the executor knows that the demand is just, recourse must be had to the device mentioned by Kazi Khan."

[3] "If injury be apprehended from reference to the Kazi."

the estate appears, he will be entitled to recover the debt due to him proportionately from the different heirs. He can do this, however, only by taking all of them before the Kazi. But if he proceeds[1] against any one of them, he can recover his debt to the extent of the share in such person's hands whatever that be.[2]

The right of guardianship in respect of the property of infant children belongs preferentially to the father; in his absence to his executor; when the father has died without appointing an executor, the guardianship appertains to the grandfather, and in his absence to *his* executor, and to his executor's executor. If there are none of these, the guardianship belongs to the Kazi and his appointee.[3]

In the Alamgiri the above principle is stated in the following terms:—"The executor of a father is in the place of a father. So also the executor of a grandfather is in the place of a father's executor, and the executor of a grandfather's executor is in the place of the grandfather's executor. And the executor of the judge's executor is in the place of the judge's executor when his appointment was general."

If the father dies after appointing an executor and leaving him surviving several children, some of whom are adult and some minors; and, subsequent to the testator's death, some of these children were to die leaving them surviving infant children, the executor of the father would be the *wasi* of these children also, and would be entitled to manage their properties both moveable and immoveable, or to sell them [under the restrictions mentioned before].

[1] *Lit.* "if he can get hold of any one of them."

[2] I have tried to adhere as closely as possible to the phraseology of the text.

[3] According to Mohammed, the grandfather comes after the father; the view in the text is that of Khassâf, according to whom is the *fatwa*.

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But a *wasi* appointed by the brother, mother, uncle or any other relation has no such powers. They cannot sell the immoveable property of the minor; and are only authorised to take care of the infant and his property; they cannot trade for him; and they can only buy things which are necessary for the infant, such as food and raiment; and they can only sell chattels inherited by the infant from the person who has appointed the executor, "for the preservation of the price of chattels is easier than of the things themselves."[1]

To summarise—a *wasi* appointed by the mother has no power to intermeddle with any property which her children may have inherited from their father or any other relation, whether it be involved in debt or not; nor can he sell any portion of the immoveable property inherited from her, unless it is involved in debt or burdened with the payment of legacies. If the estate is involved in debt or burdened with legacies, he can sell any portion of the property, whether moveable or immoveable, sufficient to pay off the debt. If all the heirs are adult and present, and the estate is free from debt, he can sell no portion of it, but if the estate is involved in debt, his powers are subject to the same rules which apply to an executor appointed by the father. If some of the heirs are adult and some minors, and the adult are absent, and the estate is free from debt, he can sell what is moveable, whether it belongs to the share of the minor or the adult, but cannot sell the *akâr* of either the minors or adults. If the estate be involved in debt, his powers are exactly similar to those of the father's *wasí*. If the adults are present and the estate free from debt, the executor may sell the minor's share of the moveable estate, but as to whether he can sell the share of the adults opinions differ, but

[1] Radd-ul-Muhtâr, V, p. 697.

he certainly cannot sell the *akâr*. The mother's *wasi* cannot lawfully purchase anything for her minor children, except food and clothing which are necessary for their preservation. Whatever has been said as to the executor of the mother is true of the executor of the brother and the paternal uncle, the principle being that the power of the executor is measured by the power of his testator."

The executor is entitled to repay himself any expenditure incurred by him on behalf of the infants, but he must keep proof thereof. In the Kazi Khan, however, it is stated, that he may recoup himself though he may have no witnesses of the fact that he has incurred the particular expenditure. None of these restrictions apply to a father or mother, when either of them happen to be the guardian. But it is preferable that they should also keep evidence.

The executor is also entitled to recover from the estate in his hands any expenses paid by him out of his own pocket, for the funeral of the testator or of any of his heirs; or in the discharge of the debts of the testator or his heirs.

Where an executor pays any claim made against the estate of the deceased *without due proof* thereof, he will not be entitled to any credit for such payment in the administration of the testator's assets, when the payment is questioned by the creditors of the deceased. But no responsibility attaches to him if the payment is made upon satisfactory evidence. "Whether he can pay when two just persons testify to a debt in his presence but do not testify to it before the judge, and the debt is denied by the heirs, is a point upon which 'our' shaikhs have differed, some saying that he may pay the debt and others that he may not."[1]

[1] Alamgiri, VI, p. 235.

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Where the executor has satisfied one creditor without an order of the judge, he is responsible to the other creditors; but it is otherwise if he made the payment under the direction of the judge. Similarly, when a debt has been made obligatory on the estate of the deceased by the decree of a judge, and the executor has satisfied it, after which another person prefers a claim against the estate, the executor is not liable if the payment was made under the judge's order. But the second creditor may have recourse against the first for a share of what he received proportionate to the debt, if what he received be still subsisting; and if it has perished in his hands, he is responsible to the second in the same proportion, but the executor is in nowise liable. If, on the other hand, the executor had paid without the order of the judge, the second creditor may claim either from the executor, or the first creditor, a due proportion of what was received by the latter.[1] When an executor has expended the whole of the estate upon the infant children of the testator and nothing remains, after which a claim is made against the estate and is established by proof before the judge who decrees it, can this creditor make the executor liable? It seems that if the expenditure was made by order of the judge, the executor is not responsible, whereas if it were made without the judge's order, he is liable.

Shiah Law.

An executor is not responsible for any loss or destruction of the deceased's property, unless occasioned by his departure from the conditions or rules of his office, or by some personal neglect. If he be a creditor of the

[1] "When an executor wishes to pay a debt to a creditor and is apprehensive of other creditors appearing against the deceased, he may sell something belonging to the estate to the creditor in exchange for the debt, and will not then be responsible, should another creditor appear as apprehended;" Alamgiri, VI, p. 235.

deceased, he can lawfully pay himself out of the property in his hands without the order of a judge when he has proof of the debt, though some lawyers think he may do so in all cases without a judge's order. According to the *Sarâir*, the executor cannot purchase for himself on his own account any portion of the deceased's property, but the Mohakkik thinks "he may lawfully do so at a just valuation."

Shiah Law.

The Shiahs differ from the Hanafis in holding, that the appointment of any other person, as *wasi*, is not valid in the presence of the father of the deceased, for the right of guardianship over the minor children belongs to the grandfather to the exclusion of the father's executor. Ibn Junaid, however, thinks that the nomination by the father is valid "to the extent of a third of his property and for the discharge of all rights or claims upon his estate."

According to the Hanafis, the competency of an executor has reference to the time of the testator's death. For example, if a minor or a slave is appointed as a *wasi* and he attains his majority before the testator's decease, the appointment is effective. Some of the Shiah jurists hold the same view, pre-eminently Ibn Junaid. According to the Mohakkik, however, the generally received doctrine is, that the qualifications required in an executor have reference to the time of his appointment, and, consequently, the appointment of a minor, or a slave, or any person otherwise incompetent, is initially invalid, though the disability may cease prior to the testator's death.

The testator can appoint a *wasi* or guardian for every person over whom he can exercise the *patria potestas* of the Mahommedan Law, as for example, a child how low soever in descent, provided that the child is of tender age or a minor. But if a person should appoint an executor for his children who are *sui juris*, the appointment is of no

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effect in law. And even though the appointment should be for the superintendence of property which the testator himself has left to the parties, the executor has no right to deal with it even to the extent of a third. He can, however, lawfully separate from it enough for the discharge of his debts and bequests, charitable or otherwise.

It is lawful for every one, who has the superintendence of the property of an orphan, to take from it the ordinary remuneration due for his trouble.

Limited Executorship. Hanafi Law.

When a person appoints one executor for a particular purpose, *e. g.*, for the payment of his debts, and another for the administration of his property generally, or if he uses the following expression, "I have appointed so and so my executor to pay my debts and do not appoint him for anything else, and I have appointed so and so my executor for all my property," both are executors in all matters, according to Abû Hanifa and Abû Yusuf, as if he had appointed them both *generally*, but according to Mahommed each is restricted to the particular purpose for which he has been appointed. Where it is made an express condition that one shall not be executor in the matter to which the other is appointed, it has been said by Mohammed ibn ul-Fazl that their powers will be limited according to the directions of the testator, and it is only where he has not made any such condition that there is the difference of opinion above mentioned, the *fatwa* being with Abû Hanifa.

Derivative Executors. Hanafi Law.

With reference to the transmissibility of the office of executor, there is considerable difference, as pointed out already, between the Hanafis and the Shiahs. The provisions of the Hanafi law are, in some respects, analogous to the principles of the English law. For example, although under the English law, the executor cannot assign the executorship, yet the interest vested in him by the

will of the deceased may, generally speaking, be continued and kept alive by the will of the executor; so that if there be a sole executor of A., the executor of the executor is, to all intents and purposes, the executor and representative of the first testator. Similarly, under the Hanafi Law, an executor may, on the approach of death, appoint a successor though the power may not have been expressly reserved to him by the testator.[1] It is not necessary that the executor should expressly constitute *his* executor to be the *wasi* of his testator's estate; the mere appointment as *wasi* to the executor carries with it the power to administer both estates. And if A. appoints B. as his executor and C. appoints A. as his executor, upon the death of A. and C., the executorship of both A. and C. devolves on B. According to the generally approved doctrine among the Shiahs, the executor can transmit the office, or appoint a successor, only when the testator has authorised him to entrust to another the management of the estate at his own death. When a person dies without appointing an executor, or when an executor dies to whom the authority to appoint a successor was not given, the superintendence of the original testator's estate devolves upon the judge. If there is no judge present on the spot, any true believer in whom confidence can be placed may lawfully assume the care and management of the estate. "But, on this point," says the Mohakkik, "there is room for doubt and difference of opinion."[2]

Shiah Law.

[1] In the case of *Shaikh Hafiz-ur-Rahman* v. *Khadim Hossain*, 4 N. W. P. Reps. p. 106 it was held that under the Mahommedan Law, an executor is entitled to nominate a successor to carry out the purposes of the will under which he was made executor. This is of course under the Hanafi Law.

[2] In the Jâma-ush-Shattât the approved doctrine is stated to be that where reference to a judge is impossible, it is incumbent *(wâjib)* upon the just "Momins" to assume the management.

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Section IV.

THE LAW OF WILLS (SHÂFEÏ DOCTRINES.)

The power to will is vested in everybody, Moslem or non-Moslem, without distinction of sex, who is *sui juris*, possessing reason, free, and, "according to our doctrines," not labouring under the inhibition of imbecility.

The power is not given to an alien, to a person in a state of trance, or to a minor, though a jurist has maintained that this prohibition should not extend to a minor, who has attained the age of discretion. A slave cannot make a will, unless, according to some jurists, he had been liberated after having made his will, and had died without having renewed his dispositions.[1]

Testamentary dispositions in favour of the public must have a lawful object; thus a will could not be made for the support of a Christian church or a synagogue. A legacy in favour of one or more individuals is lawful if the person or persons designated are capable of exercising the right of proprietorship. Thus, a legacy in favour of a child *en ventre sa mere* only takes effect on the twofold condition, that such child should be born alive, and that the conception should have taken place before the time of making the disposition, that is to say, that the birth should take place before six months should have elapsed from the date of the will. If the birth takes place beyond the period of six months, the child is supposed not to have been conceived previous to the

[1] تصح وصية كل مكلف حرّ و ان كان كافراً و كذا محجور عليه بسفه على المذهب لا مجنون و مغمىً عليه و صبي &c.

testamentary disposition, at least if the parents have not ceased to cohabit with each other. In the opposite case, conception is admissible for a maximum term of four years. A will in favour of a slave reverts to the master, unless the slave has been freed before the testator's decease. As for subsequent liberation, followed by an acceptance on the part of the slave, the result depends upon the question, whether the possession of the legacy has been acquired or not before the death of the testator. Testamentary dispositions in favour of animals are absolutely void, whether the intention was expressed to constitute the animal as proprietor, or whether nothing to that effect had been mentioned; but if a declaration has been made that the animal should never want for necessary food, traditional doctrine admits the validity.

A legacy for the support of a mosque is legal, and even a will "in favour of a mosque," without adding anything else. However, in this case, the disposition is supposed to have been made, not only for the support, but also for the embellishment of the edifice. Moreover, a will may be made in favour of an infidel, either subject to a Mahommedan prince or not, of an apostate, and of one's own murderer. A legacy in favour of an heir can only take effect with the unanimous consent of the co-heirs, pronounced after the succession has passed. This approbation is necessary even if the co-heirs renounce the succession, and it cannot be given before the death of the testator. But the disposition is only rendered invalid by the existence of co-heirs at the time of the decease, and this cannot be declared previously. A testamentary disposition, the effect of which is to leave each heir his legitimate inheritance, is null and void; but there is no impediment against giving any one heir, by testament,

any particular thing being the value of the portion due to him by law. Only the act must be approved of by the co-heirs.

A person may lawfully devise the following objects :—

1. The usufruct of things that do not suffer in the course of time.

2. The future fruit of a tree, the future young of an animal &c.

3. One of two objects, the legatee to take his choice.

4. An impure thing, provided its use is not prohibited by law, for example a trained dog, the juice of grapes not meant for fermentation, &c.

A legacy worded as "one of my dogs," must be carried out by the heir giving any dog belonging to the defunct, and the disposition is null and void if the testator possessed none. A person, who possesses many dogs among his property, may give away all or some of them by will, even if the dogs constitute the major portion of the heritage. If a person possess two drums, the one a musical instrument for amusement, the other an instrument to be used legitimately—for example, a war-drum, or a drum used by pilgrims, the bequest of "a drum" without further particulars would refer to the latter. Furthermore, a special legacy of a drum for amusement is null and void, unless it can, at the same time, be used for warlike purposes and pilgrimages.

Rules as to the third.

Testamentary dispositions should not exceed the third of the property of the testator; and such as have been made contrary to the precepts of the law will be reduced to the allotted portion, upon demand of the heir or heirs. When, on the other hand, the heir declares his approval

of the disposition, it takes effect, whatever the amount may be; but, according to one jurist, it is then considered as a pure donation by the heir.

The reduction is determined by collecting all the property existing on the day of the decease, or, according to others, on the day the disposition is made. By the dispositions to which effect should be given out of the third are understood the following:—

(1) Gratuitous emancipation which is to be effected upon the death of the testator.

(2) Voluntary dispositions, such as *wakfs* and *hibas*, constituted during the last illness.

(3) Payment of lawful debts.

In case all this should exceed the disposible third, the following rules must be observed in the reduction:—

1st. When the testamentary disposition consists simply of a direction to enfranchise slaves, lots must be drawn in order to decide which of them should be deprived of his liberty in consequence of the reduction.

2nd. When the testamentary dispositions consist of bounties of different kinds, all are subject to a proportionate reduction.

3rd. When the dispositions include the liberation of slaves as well as other bounties, the portions available must first be divided in proportion to the two categories of the legacy, and then the same rule as we have mentioned in the 1st and 2nd clauses must have effect.

Marz-ul-maut.

A person, who is suffering from an illness from which there is an apprehension of death, cannot make a valid disposition of more than one-third of his available assets; but if he recovers against all hope, these dispositions

cannot be impugned. If a person be suffering from a slight illness involving no danger to his life, he can dispose of his property unrestrictedly; and even if he dies during this illness unexpectedly, his dispositions take their full legitimate effect. This would not be the case if the death was the natural result of the illness from which he was suffering, though it be not considered of a dangerous nature, for under such circumstances it proves itself to have been dangerous. In case of uncertainty about the character of the disease, it must be referred to two doctors, free and irreproachable. The following are considered by the law to be dangerous diseases:—colic, pleurisy, incessant bleeding from the nose, chronic diarrhœa, hectic fever, the commencement of paralysis, even partial, the vomiting of food without its having undergone any change in the stomach, and even vomiting in general, if it is very bad and accompanied by pains and effusions of blood, continual or intermittent fever, but not ague. The following circumstances are assimilated by "our" doctrines to dangerous diseases:—having been made prisoner of war by infidels who give no quarter; being in a routed army-corps, assailed by the conqueror; having been condemned to death in retaliation, or to be stoned to death; being in a vessel during a storm, or in a rough sea; a woman undergoing great labour-pains, be it before or after confinement, as long as the fœtus has not severed the membrane.

Testamentary dispositions are formulated thus:—"I leave to him such or such thing," "Remit it to him," "Give it to him after my death," "I make it his," "It shall be his after my death;" but in saying only, "It is his," not a legacy but an avowal is pronounced. On the contrary, if it be said—"It is his in my succession," it is a valid testamentary disposition. Testamentary dis-

positions can be formulated in another manner, which though not so explicit, equally indicates the last will, for example, a written statement containing the will given to the witnesses.

A legacy in favour of a class of people, as for example, "the poor" need not be accepted expressly, but the decease of the testator renders it irrevocable; while, on the contrary, a legacy in favour of one or two given people must be formally accepted by them. This acceptance, like the repudiation of a legacy, cannot take place during the testator's lifetime, and it is, even, not customary that the legatee should declare his wish immediately upon the testator's decease. A legacy becomes null by the predecease of the legatee; if he dies after the testator but before having accepted the legacy, the right of acceptance devolves upon his heirs. As regards the question,—when does the property become the legatee's, some jurists consider he becomes entitled to possession immediately upon the death of the testator, provided he accepts the legacy; others maintain that he only becomes the proprietor upon accepting it; others, again, hold that previous to the acceptance the legacy is suspended, but that the legatee is the actual possessor from the time of the testator's death if he accepts, otherwise the heirs are presumed not to have lost possession thereof. The three different doctrines we have enunciated on the subject of legacy between decease and acceptance, also exist with regard to fruit and to earnings realised by a bequeathed slave as well as with regard to other expenses, such as the support of a slave, and the money to be paid to him for observing a fast. According to the authors, who admit that a legacy remains suspended until the legatee has accepted or rejected the same, he must, nevertheless, provide for the temporary support of the slave or of the animal bequeathed.

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The Legatees.

If a person were to bequeath "a sheep from my flock," the disposition will be void if the testator possessed no flock of sheep; but if he had said "a sheep from my inheritance," in case the testator should leave no sheep, one must be bought and given to the legatee.

A legacy in favour of "the child of which a certain woman is *enceinte*," devolves upon the two children if she gives birth to twins; and upon the child born alive, if she gives birth to twins of which one is still-born. If, on the contrary, the testator added, "if it be a boy," or "if it be a girl," the birth of twins, if one be a boy and the other a girl, renders the disposition null and void. The legacy can only be claimed by the boy exclusive of the girl, should the testator have added, "If she bears a boy within her bosom." Finally, a legacy worded thus is also valid, in case the woman in question should give birth to two twin boys; and the heir can, under these circumstances, give the bequeathed object to one of the children according to his own choice.

A legacy in favour of a person's "neighbours" extends to forty houses in four different quarters; a legacy in favour of "learned men" includes all those who study law, that is, the Koran, the traditions of the Prophet and jurisprudence. But it does not extend to the simple readers of the Koran, to men of letters, interpreters of dreams and doctors, nor, according to most jurists, to theologians properly speaking.

A legacy in favour of the poor also implies the indigent and *vice versâ;* in both cases, the legacy must be divided into two equal portions—one for each class, provided it consists of at least three persons. The testator may, also, bequeath to one of the persons of the category in ques-

tion, more than to the others who have the right; while, according to our doctrines, a legacy "to such a person and to the poor," results in the person designated not receiving more than each separate one, however little the portion may be, so long as there is some value. Only the person mentioned must not be entirely excluded.

One may also bequeath not only to a certain category of people, without indicating the number of individuals of which it is composed, for example "to the Alides," but also to a fixed number, for example "to three persons" of a certain category and "to the relations" of a certain person. Regarding this latter form of legacy it must be remarked that it implies all the relations even the most distant, excepting relations of the direct line, be it ascendant or descendant. However, the relatives on the mother's side are not understood in the testamentary dispositions made by the Arabs in favour of "relations," unless specially mentioned. In order to find out the "relatives" of the person favoured by the testator—you must take the nearest ascendant, and this person's descendants remaining in the tribe, are those the testator must be considered to have had in view. If, on the other hand, the testator used the expression, "the nearest relatives" the legacy also applies to the direct line, always providing that the son takes precedence over the father, and the brother over the paternal grandfather, but beyond these exceptions the law gives no preference under these circumstances to either sex. The father and mother, sister and brother are all equal participators in the legacy, and even the son of the daughter takes precedence over the great-grandson agnate. A legacy in favour of a person's own relatives (*akriba*), does not include the rightful heirs.

What may be bequeathed.

One can bequeath the usufruct of a slave or of a house, as well as the lease of a shop. In that case, the legatee has not only the full enjoyment of the service of the slave, but also gets the proceeds of his work, and even of her marriage-dower, if the slave be a woman. Furthermore, if the slave gives birth to a child during the duration of the usufruct, its condition is the same as its mother's, that is to say—the legatee has the usufruct of it and it does not become the property of the heir. But the heir has the right of enfranchisement, and he must support it making no distinction between temporary and perpetual usufruct. The sale of a thing, the usufruct of which to the extent of one-third has been bequeathed for a limited period of time, has the same consequences as the sale of a hired object; but a perpetual usufruct may not be sold unless to the legatee. If one should desire to know whether the legacy exceeds the disposible third or not, the perpetual usufruct of a slave must be assimilated to actual possession; if the usufruct be only temporary, the value of the slave's services must be ascertained with regard to the length of time during which the proprietor is deprived of the same.

A person may legitimately direct his heir to make, or to cause to be made, a voluntary pilgrimage which he himself intended to undertake. In this case, the heir must pay the journey to Mecca, from the station fixed by the law, unless the deceased mentioned any special town whence the pilgrimage should start. As regards the obligatory pilgrimage neglected by the deceased, this act of devotion falls to the charge of the bulk of the property; though if the testator has enjoined the heir to bear the costs, either from the bulk or from the disposible third, his last will must be regarded. If

the deceased expressed no wish on this point, the charge imposed upon the heir to accomplish the neglected compulsory pilgrimage, falls upon the bulk, or according to others, upon the disposible third; but in every case this charge only relates to the journey commencing from the station fixed by the law. Any person, though he be not one of the family, can make the necessary pilgrimage on behalf of the deceased, without any express mandate from him.

The heir must also take upon himself the discharge of pecuniary liabilities for expiations fixed by the deceased, the fulfilment of which had been neglected. With regard to other expiations, the heir may, according to his own choice, give food or clothing to the poor, if necessary, and even enfranchise a slave. In any case, and whatever be the nature of the expiations, the heir can fulfil it at his own cost if the inheritance be not adequate, and it counts equally as an act of the deceased. If the expiation is made by a person other than a member of the family, the conditions are the same as regards the distribution of food and clothing, but not if the expiation consists in enfranchising a slave. The soul of the deceased is benefitted by alms and pious invocations made on its behalf, whether they be offered by his heirs or any other persons.

Revocation.

A testamentary disposition is wholly or partially revocable. It may be revoked :—

1. Verbally, for example, by pronouncing the words "I cancel the will," "I annul it," "I revoke it" "I renounce it," or "the thing which I have bequeathed, shall nevertheless be my heir's."

2. By the fact of having disposed of the bequeathed object, by sale, enfranchisement, marriage, gift, or by pledging it, even if, in the two latter cases, the seizin by the donee or the creditor have not taken place.

3. By a charge imposed in a later will—upon the heir to dispose of the object bequeathed in any manner mention in para. 2.

4. By the order to sell the thing bequeathed, by putting it up for sale, even if unsuccessfully, or by the fact of mixing other objects with the thing which has been bequeathed. If a particular kind of wheat is bequeathed and it is mixed with some other wheat, that very fact is sufficient to constitute an ademption even though the wheat added to the heap is of a superior quality. But if it be of equal, or inferior quality, the fact of having mixed it with the first wheat, does not constitute a revocation of the bequest. Revocation also results from the following facts:—from having ground the bequeathed wheat, having sown one's field with it, having made the bequeathed flour into bread, having spun the cotton bequeathed, having woven the threads bequeathed, having made a bequeathed piece of stuff into a shirt, having built or planted upon bequeathed ground.

Executors.

The Prophet has introduced the custom of appointing testamentary executors, to take charge of the payment of the testator's debts, of the execution of his last will, and the guardianship of his infant children. An executor must be a Moslem, *sui juris*, possessed of full reason, free, irreproachable and capable of the charge entrusted to him. An infidel subject of a Mussulman prince may be

appointed executor by a co-religionist; nor is blindness any cause for incapacity.

The law does not exact that the executor should be of the male sex; the mother of the infant children ought to be considered more capable of bringing them up than any other person.

An executor must be deposed for notorious bad conduct; this principle applies also to a judge, but not to the Head of the State.

The right of appointing an executor to undertake the payment of debts and the execution of the last will of the testator is accorded to all Mussulmans of age,—possessed of understanding and free; but the right of vesting the executor with the guardianship of young children, belongs exclusively to the person who is their legitimate guardian. An executor cannot, in his turn, appoint by will a person to replace him after his own death, unless such power had been given him by the primary testator. Nothing prevents the nomination of two executors to succeed one anothor: this can be done by the words, "I make you my testamentary executor until the majority of my son," or "until the arrival of Zaid and then my son," or "Zaid will take charge of this will." On the other hand, a testamentary executor cannot be appointed to the guardianship of the children, during the lifetime of their paternal grandfather, their natural guardian, if he is capable of undertaking the guardianship.

It is prohibited to give the executor the power of making a contract of marriage for the son of the deceased during minority, or to represent the daughter of the deceased in a similar contract.

The words by which an executor may be appointed are:—"I nominate you my testamentary executor," "I entrust

my affairs to you," etc.; but there is no impediment against adding a suspensive condition. Besides this, the duty with which the executor is being charged must be clearly defined, for if nothing more is said than, "I nominate you my executor," the disposition is void. The nomination of an executor has no effect before the duty has been accepted, and this acceptance must take place during the testator's lifetime.

If the testator has appointed two executors, neither of them can act without the assistance of the other, unless the power has been formally given to him. The testator can revoke the nomination at any time, and the executor can renounce it even after acceptance if he think fit. Upon an infant attaining majority, an executor charged with the guardianship must give an account of his administration, and in case of dissent the law presumes in favour of the executor's words, if the question concern the minor's maintenance. On the other hand, the law presumes in favour of the latter if the dispute relates to any sum which the executor maintains he gave to his ward after he attained majority.

APPENDICES.

I.

"There is no divergence of view regarding the validity of a *wakf* of horses or implements of warfare, nor of those moveables and chattels which are constituted *wakf* by implication, when included in a *wakf* of land, [as implements of husbandry, cattle, &c.] This is according to the *ahâdis mash-hûra*. With reference to the lawfulness of a *wakf* of other kinds of moveable property, there is a conflict of views [between Abû Yusuf and Mohammed]. For according to Abû Yusuf, a *wakf* of moveables is invalid; whereas, according to Mohammed, all articles, which form the subject of barter, trade or business may lawfully be dedicated. And this view has been adopted by the majority of jurists, as is mentioned in the Hedâya; and in the Asaâf it is mentioned to be the correct doctrine. And in the Zahîria it is stated that in human transactions, analogy (*kyâs*) has no application. And in the Mujtaba, it is mentioned after the *Siyar*, that, according to Mohammed, the *wakf* of moveables is absolutely valid. According to Abû Yusuf, the *wakf* of those meveables as form the subject of business transactions is lawful. In the Khulâsa, the views of Ansâri have been adopted; Ansâri was a disciple of Zuffer. And in Kazi Khan, [it is stated] that Zuffer agrees with him. Sharniblâlich also mentions that Zuffer has held so. In the Manah it is stated from the author, that in our times the *wakf* of dirhems and dinars is customary in the countries of Rûm, &c.; and such *wakf* would come within the meaning of Mohammed's doctrine, upon which is the *fatwa*, 'that the *wakf* of all moveables which form the subject of transactions between people is valid.' Consequently, it is not neces- App. I.

App. II-III. sary to depend alone on the dicta of Imam Zuffer reported by Ansâri for the validity of a *wakf* of dirhems and dinars. Verily, the Moulana, the *Sâhib-i-Bahr* (the author of the *Bahr*) has given a *fatwa* that the *wakf* of dirhems and dinars is lawful and has not stated any contrary doctrine. And the opinion which is given in the Manah is the view of Ramli. ... And the *wakf* of a cow in order that its milk be distributed among the travellers is lawful wherever it is customary. And Ansâri was asked if the *wakf* of dirhems and such things as can be weighed and measured would be valid? He answered, 'yes'; on being questioned how that could be, the reply was in the way of *shirkut-i-muzâribat*. (*Shirkut-i-muzâribat* is a partnership in which one partner supplies capital and the other labour). And things which are capable of being weighed or measured will be sold and the proceeds invested in *shirkut-i-muzâribat* or commerce, &c.;" Radd.

II.

"In the Durrur, in the chapter relating to the duties of the Kazi, it is stated that a Hanafi Kazi cannot deliver decrees according to the Shâfeï or Mâliki doctrines, but a Hanafi can decree according to the doctrine of Abû Yusuf or Mohammad and [his doing so] will not be regarded as contrary to the doctrine of the Imam;" Radd.

III.

"In the Zakhîra it is stated from Shams-ul-aïmma al-Halwâï that he was asked with regard to a musjid or reservoir which had become ruined and no person had any need for it, nobody being in existence [at that place] whether the Kazi could spend its *wakf* on another musjid or reservoir—and he replied, 'yes.' And so it is stated in the Bahr from the Kunia. And Shaikh Imam Aminuddeen ibn-i-Abd-ul-Âl, Shaikh Imam Ahmed ibn-i-Yunus-ash-Shibli, Shaikh Zain ibn-i-Najîm and Shaikh Mohammed al-Wafâi have given *fatwas* to the same effect, some to take the materials of the ruined mosque to another, and some to take both materials as well as the belongings. .... Especially, in the

present times, it is necessary to follow this rule, because if the materials of a mosque or any other building or structure are not removed and applied to another building or structure of the same kind, they are misappropriated by thieves and wrong-doers, who possess themselves of the *awkâf* (wakfs) attached to those buildings, and the custodians and curators thereof embezzle their income...... ;" Radd.

IV.

"In the Asaâf it is stated that *wakf* is *jâiz* or obligatory according to all 'our' jurists, *viz.*, Abû Hanifa and his disciples. In the Asl it is stated that Abû Hanifa did not hold it *jâiz*, but this is not correct. The only difference is as to the time when it becomes obligatory. According to Abû Hanifa, it becomes obligatory upon the Kazi's decree or when it is a bequest. According to the Disciples, it becomes obligatory without any of these incidents, and this is the accepted doctrine of the universality of our jurisconsults, and it is correct. According to Abû Yusuf it becomes operative upon the mere mention of the word *wakf*, for it is an act of piety equivalent to the emancipation of a slave : and the *fatwa* is passed according to this;" Radd.

V.

(1) *Karâbat*, literally means relationship, but is often used to imply related.

(2) *Karâbatdar* and *zu-karâbat* mean one who is related.

(3) *Zee*, inflected sense of *zu*.

(4) *Zavi*, plural of *zu*.

(5) *Akriba* plural of *karib*, next of kin, people nearly related.

(6) *Arhâm*, plural of *rahm*, womb; technically means uterine relations.

(6) *Fakeer* and *miskeen*, both words are applicable to indigent people, but a *fakeer* may be possessed of some property, the whole of which must not amount to more than a *nisab*; a *miskeen* has no property or habitation. See the Hedâya, Vol. I, p. 54.

App. VI-VII.

VI.

Under the Shiah Law when a legacy is bequeathed to several persons or to a class of persons, it is divisible among them all equally. For example, if a person were to make a bequest in favour of his children, some of whom are males and some females, the legacy will be divided among them all equally without distinction of sex. Similarly, when the legacy is in favour of uncles and aunts, whether paternal or maternal, or both together. But where the testator has made a distinct apportionment, giving more to some than to others, his directions must be given effect to.

Under the Hanafi law, the death of the legatee in the lifetime of the testator causes the legacy to lapse; under the Shiah law, it is different. If the legacy is not adeemed by the testator, the death of the legatee does not cause a lapse. It descends to the legatee's heirs; should he leave nobody, it would revert to those of the testator; Jâma-ush-Shattât; Sharâya.

VII.

According to the Shiah doctrines, in no case is there an escheat to the *Bait-ul-mâl.* The Jâma-ush-Shattât declares "the idea of a *Bait-ul-mâl* is abhorrent to us." (See the Personal Law of the Mahommedans, where I have discussed this subject very fully.)

According to the earlier Hanafi jurists, when a person died leaving a particular heir who took only a specific share, and was not entitled to the residue by right of return, such residue went to the *Bait-ul-mâl.* If there was a general legatee he took the residue. But the tendency of modern jurists and the decisions of the Courts is to hold that whenever there is an heir, there is no right in the *Bait-ut-mâl.* Consequently, if a person died leaving a widow and bequeathing half his estate to S., the one-sixth which remained over after allotting the widow's share and the legacy, would be given to the widow.

VIII.

App. VIII-X.

According to Abû Yusuf, dirhems and dinars (*i, e.*, money in general) are *ain*, [objects in specie].

When the testator leaves to another a legacy of a thousand dirhems, and his property consists of cash and effects besides debts, the legatee is to get his thousand dirhems from the third of the assets; but if the third does not satisfy the legacy, a third of the debts as they are realised will be paid to the legatee, until the legacy is satisfied. According to Abû Yusuf, the *assets* would have reference to the cash left by the deceased and not to the household effects, apparel, or ornaments left by the deceased. So that the thousand dirhems will be paid out of the third of the dirhems and dinars left by him, and if that is not sufficient, out of the third of the debts as they are realised; Radd, V, p. 660.

IX.

With reference to a mutwalli appointed in a general manner, the meaning of the term عموم "or general" is thus explained in the Anfa-ul-Wasâil:—"that the wâkif appoints a mutwalli and places him in his own place and constitutes him his successor, and authorises him to assign the trust to whomsoever he likes, in such a case the mutwalli can transfer the trust either in health or death-illness"; Radd-ul-Muhtâr, III, p. 639.

X.

"A *wakf* may be established without any evidence of the wâkif's declaration. This is the doctrine laid down by Abû Yusuf; and the jurists of Balkh, such as Abû Jafar and others, follow this view; Khassâf also has adopted it. In the *Khairiyeh* it is stated that where there is an old *wakf*, known by reputation to be *wakf* and its wâkif is unknown, should a wrong-doer get possession of it, the mutwalli can establish his claim, according to the approved doctrine, by the testimony of two witnesses; and the Jâma-ul-Fusulain has followed this view;" Radd, III, p. 645.

App. XI.

XI.

"A person dies leaving two minor children. These on attaining majority demand their inheritance from the *wasi*, who says that the entire inheritance left by their father was 1000 dirhems which had been spent on them. One of the sons affirms the statement of the executor, but the other does not. The latter will be entitled to recover, according to Zuffer, 250 dirhems from the first but not from the executor. And this is also the view of Abû Hanifa. Ibn-i-Abû Mâlik, however, reports from Abû Yusuf that he can. So it is said in *Muhît-i-Sarakhsi*," Alamgiri, VI, p. 221.

"If a person dies leaving minor children and a father, but without appointing an executor, the father is in the position of an executor for the protection of the inheritance (في حفظ التركة) and can administer the property in whatever way it may be necessary, (والتصرف فيها اى تصرف كان). And if the deceased has left heavy debts, (دين كثير) the father, that is, the grandfather of the minors, has no authority to sell the inheritance for the payment of the debts. Similarly, if a person authorises his adolescent son (صغير المرا هق) possessed of understanding to buy and sell, and he enters into any transaction and becomes indebted, after which he (the son) dies leaving his father, the father will have no power, to deal with the son's property to pay his debts;" Alamgiri, VI, p. 225.

"A person, who is in debt makes certain bequests, all of which, after the payment of the debt, can be discharged out of the third. He dies leaving a house; and the *wasi* cannot pay his debts or discharge the legacies, without the price of the house; but the heirs are not agreeable to the sale of the house, when the debts do not cover the whole house or the major portion of the house, so as to leave a small part of it,—in such case, the *wasi* is empowered to sell the house, and he should sell it if he is aware that the debts will remain unpaid for a long time if he does not sell it;" Alamgiri, VI, p. 227.

XII.

Ibn-i-Zuhra Halebi (the author of the *Ghunia*, غنية,) Shaik Nasîr-ud-din Tusi, (the author of the *Mabsût*,) Mohammed ibn-i-Idrîs-al-Hilli (the author of the *Sarâir*, سرائر,) and Shaikh Murtaza are the principal jurists, who, on various legal questions, differ from the Mohakkik. One important point of difference may be noted here, *viz*., the consent of the debtor to a discharge by the creditor, in other words, whether acceptance (*kabûl*) is necessary in *ibra* or release. The Mohakkik, as mentioned already, does not think the consent of the debtor is required to give effect to a discharge. The jurists abovementioned are of opinion that acceptance is as much needed in *ibra* as in gift.

App. XII-XIII.

XIII.

The passage, quoted from the Alamgiri in page 570, opens up such a serious question regarding the power of a father, or an executor, to give in pledge the property of a minor, that I think it advisable to give here a translation from the Kazi Khan, on the authority of which the passage in question is founded. " The *wasi* is not entitled to lend out the property of the orphan; and if he does so, he would be liable. The Kazi, however, has the authority to lend. With regard to the father, there is difference among the jurists. ...... The correct doctrine is that the father is like the executor and not like the Kazi. If the executor borrows himself the property of the minor, it is not lawful and it will be a *dain* (debt) upon him. It is reported from Mohammed that, according to Abû Hanifa, the *wasi* has no authority to borrow from the property of the minor; but Mohammed expresses a hope that if the *wasi* does so when he is able to repay, his act may not be reprehensible. If the *wasi* or father pledge the property of the minor for his (the *wasi's* or father's) own debt, according to *kyâs* (analogy), it would not be valid; but, according to *istehsân* (a liberal construction) it would be valid. And it is stated from Abû Yusuf that he has

App. XIV. adopted the (doctrine of) *kyâs*. If the *wasi* discharges his own personal debt from the property of the minor, it would not be valid; if the father does so, it would be valid, for the *wasi* has no power to buy the property of the minor for himself according to current price, but the father can lawfully make such a purchase. And pledge is like the payment of a debt; and [accordingly] the father may discharge his personal debt from the property of the minor, but it will not be lawful for the *wasi* to do so. And the same is the case with pledge. And in the *Jâma-us-saghîr* it is stated, that when the father pledges the property of his minor child for his own debt, and the value of the property pledged is greater than the debt, and the property is lost or destroyed in the hands of the pledgee, the father will be liable for the amount of debt [which he has paid off] and not for the price of the article. But Shams-ul-aïmmah Sarakhsi has held, that the father and *wasi* will be equally liable for the value of the property pledged. According to Abû Yusuf, as neither the father nor the *wasi* are entitled to pay their debts with the property of the minor, so they are not entitled to pledge his property for their debts. *And Bashr ibn-i-Walid has stated that the father has no power to pledge the property of his child for his own personel debt.* It is generally accepted that according to *shara*, the father or *wasi* can pledge; but according to *kyâs* they cannot, and when the property pledged is lost or destroyed, they are both liable for its value;" Kazi Khan, IV, p. 436.

XIV.

"If the *wasi* of the deceased sells the estate for the payment of his debts, which do not cover the entire estate, according to Abû Hanifa, the sale is lawful, but it is not so according to the Disciples. If there is no debt due from the inheritance, and the heirs are minors, and the Kazi sells the entire estate, according to Abû Hanifa, the sale would take effect. Abû Hanifa has drawn a distinction between the [powers of the] *wasi* of the deceased and of his father. The *wasi* has the power of selling

the inheritance for paying the deceased's debts, and to give ٨٠٠ ٢١٧
operation to his legacies. But the father of the deceased, that is, the grandfather of the minors can sell the inheritance *for* his own son[1] (ان يبيع التركة لولده,) but he is not empowered to sell the estate for the payment of the debts due from the minor children on behalf of his son, [*i. e.*, their father]

(ليس له ان يبيع التركة لقضاء الدين على الاولد الصغار لولده)

Shams-ul-aïmmah al-Halwâï states this as the doctrine laid down in Khassâf. But Mohammed has placed the grandfather in the position of the father. In "the Book," (*i. e.*, the Mukhtasar-ul-Kuduri,) it is stated that when a person dies leaving a father and an executor, the executor is preferred to the father. If there is no executor, the father is preferred [for the administration of the deceased's estate] and so on in order, until the grandfather's executor, after whom comes the *wasi* appointed by the Kazi. Shams-ul-aïmmah al-Halwâï has stated that the *fatwa* is according to the doctrine laid down by Khassâf."

"If the father of a minor who has inherited property, is a spendthrift and likely to commit waste, so as to be . . . . liable to inhibition he is not entitled to the guardianship of his child's property."

"Shams-ul-aïmmah al-Halwaï has stated in his *sharh* (gloss) on the Adab-ul-Kazi [of Abû Yusuf] that when a Kazi appoints a *wasi* (guardian) for an orphan, the *wasi* so appointed will be like the *wasi* appointed by the father, if the Kazi appointed him in a general manner in all matters. But if he has been appointed in any special matter, he will be a *wasi* for that matter alone. This is not the case with the *wasi* appointed by the father. ... When the *wasi* appointed by the deceased is a just and qualified person (عدلا كافي,) it is not advisable for the Kazi (لاينبغي) to remove him, but if he is not 'just,' he should remove him and appoint another. And if he is just but is not thoroughly efficient (ولوكان عدلا غير كاف,) the Kazi cannot remove him, but should join with him a competent adminis-

[1] *I. e.* for his support and maintenance.

App. XIV. trator. If the Kazi, however, removes him, he will be removed, and, similarly, if the Kazi removes one who is both just and competent, it has the effect of removing him. So it has been stated by the Shaikh and Imam known as Khâher-Zâdeh. But several jurists aver that the order of the Kazi removing a just and competent *wasi* has no effect, for he derives his authority from the deceased, and, therefore, he is to be preferred to the *wasi* of the Kazi. And Kudûri has stated, that the Kazi has no power to remove the *wasi* appointed by the deceased or join another with him, unless he has committed a breach of trust or is a *fâsik* so as to be known as a bad man, او كان فاسقا معروفا بالشر . In such a case the Kazi can remove him and appoint another in his stead, or if he is a virtuous man but inefficient [in his work,] the Kazi can associate another person with him. So it is stated also in the Asl and its Sharh by Tahâwi. But it is not mentioned whether, if the Kazi does remove a just and competent *wasi*, it will take effect or not.[1] Shaikh Imam Abû Bakr Mohammed ibn-ul Fazl says that when the *wasi* is unable to carry out the dispositions of the testator, he ought to be removed." ....

"The *wasi* is empowered to do all acts from which benefit may accrue to the orphan, so is the father," Kazi Khan, IV, p. 436.

[1] The Radd-ul-Muhtâr is explicit on this point that it does not take effect.

SUPPLEMENT.

GIFT.

In the case of *Yusuf Ali* v. *the Collector of Tipperah*, (I. L. R., 9 Cal. p. 130,) it was held that, under the Mahommedan Law, a gift cannot be made to take effect at any future period, however definite.

LIABILITY OF HEIRS.

The liability of the heirs of a deceased Mahommedan for his debts, and their right to partition the estate before the discharge of such debts have been discussed in the following cases:—*Khaja Hedayet-ullah* v. *Raijan Khanum*—(3 Moore's Indian Appeals, p. 295,) *Asmathem-Nissa Bibi* v. *Roy Luchmeput Singh*, (4 Cal. p. 142, F. B.) *Mutty Jan* v. *Ahmed Ally*, (I. L. R., 8 Cal. p. 370) and *Sita Nath Dass* v. *Roy Luchmeput Singh*, (11 Cal. Law Reports, p. 268).

MAHOMMEDAN LAW.

In the case of *Hakim Khan* v. *Gool Khan* (I. L. R., 8 Cal. p. 826) it was held, that any custom *dehors* the Mahommedan Law was inapplicable to Mahommedans.

WASI OR GUARDIAN, SALE BY.

In the case of *Hossaini Begum* v. *Zia-ul-Nissa Begum*, (I. L. R., 6 Bom., p. 467) it was held that a brother, as guardian of his minor brother, was not competent under the Mahommedan Law to sell the property of his ward without the sanction of the ruling power; but such sanction would validate an alienation made by the elder brother as guardian, provided the transaction was such as a guardian *de jure* under the Mahommedan Law could enter into.

WILL.

In the case of *Fatima Bibi* v. *Sheikh Esau*, (I. L. R., 7 Bom. p. 266) it was held by West, J., that since the passing of Act V of 1881, an executor of a Mahommedan will cannot claim to represent the estate of his testator, until he has taken out probate.

Ibid.

In the case of *Fatima Bibi* v. *Ariff Ismailji Bham*, 9 Cal. Rep. p. 66, Wilson J., held, in the case of a bequest to charity on failure of heirs that, as the bequest to the children was invalid owing to non-assent on the part of the other heirs, the gift or bequest to the charity failed also.

Ibid.

In the case of *Prince Suleiman Kadr* v. *Darab Ali Khan*. (L. R. 8 I. A. p. 117) the question whether the words used by the testator amounted to an absolute bequest, or were simply precatory, was discussed at some length.

GENERAL INDEX.